9

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 552.

OSCAR W. REID, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED OCTOBER 1, 1908.

(21,348.)

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1 *Statement.*

1908.

January 9. Petition filed.
April 9. Answer filed.
April 14. Demurrer to answer filed.
May 14. Demurrer overruled.
May 14. Opinion, Hough, J., overruling demurrer.
May 18. Order overruling demurrer filed.
May 19. Judgment entered.
Sept. 3. Petition for writ of error filed.
Sept. 3. Writ of error allowed.
" " Bond on appeal filed.

2 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Judges of the District Court of the United States for the Southern District of New York, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said district court, before you, or some of you between Oscar W. Reid and the United States, a manifest error hath happened, to the great damage of said Oscar W. Reid, petitioner, as is said and appears by his complaint, we, being willing that such error, if any hath been, should be duly corrected and speedy justice done to the party aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, together with this writ, so that you have the same at the said place before the justices aforesaid on or before the 10th day of September, 1908, that, the records and proceedings aforesaid being inspected, said justices of the Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 1st day of September, in the year of our Lord one thousand nine hundred and eight and of the independence of the United States the one hundred and thirty-third.

THOMAS ALEXANDER,
Clerk of the District Court of the United States for the Southern District of New York, in the Second Circuit.

The foregoing writ is hereby allowed.

C. M. HOUGH,
United States District Judge.

3 UNITED STATES OF AMERICA,
Southern District of New York, ss:

OSCAR W. REID, Petitioner, Pl'ff in Error,
vs.
THE UNITED STATES, Defendant in Error.

I, Thomas Alexander, Clerk of the District Court of the United States of America for the Southern District of New York, do hereby Certify that the following is a correct transcript of the record of the District Court in the above-entitled matter, consisting of page 4 to page 81 inclusive.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, this 28th day of September in the year of our Lord one thousand nine hundred and eight and of the Independence of the said United States the one hundred and thirty third.

[Seal District Court of the United States, Southern District of N. Y.]

THOMAS ALEXANDER, *Clerk.*

4 In the District Court of the United States for the Southern District of New York.

OSCAR W. REID, Petitioner,
against
THE UNITED STATES, Defendant.

Petition for Writ of Error.

Now comes Oscar W. Reid, petitioner herein, and conceiving himself aggrieved by the judgment entered herein on the 19 day of May, 1908, does hereby pray that a writ of error be allowed from said judgment, returnable to the Supreme Court of the United States, and that a transcript of the record and proceedings and papers upon which said judgment was made, duly authenticated, may be sent to the Supreme Court of the United States, and he presents herewith his assignment of errors.

August 28, 1908.

MELLEN & WOODBRIDGE,
Attorneys for Petitioner.

32 Nassau Street, New York City.

CHAS. MELLEN,
FRANCIS WOODBRIDGE,
Counsel.

And now, to wit, on this 1st day of Sept., 1908, it is ordered that the writ of error be allowed as prayed for.

C. M. HOUGH,
United States District Judge.

5 [Endorsed:] 5211. United States District Court Southern District of New York. Oscar W. Reid, Plaintiff-in-Error, *vs.* The United States, Defendant-in-Error. Petition for Writ of Error. Mellen & Woodbridge, Attorneys for Petitioner, 32 Nassau Street, Borough of Manhattan, City of New York. U. S. District Court, S. D. of N. Y. Filed Sep. 3, 1908. M.

5½ In the District Court of the United States for the Southern District of New York.

OSCAR W. REID, Petitioner,
vs.
THE UNITED STATES.

Petition.

Oscar W. Reid, the petitioner above named, by Ward, Mellen & Woodbridge, his attorneys, for his petition against the United States, respectfully shows to the Court:

I. That your petitioner is upwards of twenty-one years of age and was born within the United States, and at all the times herein referred to was and now is a citizen of the United States and is now a citizen of the State of New York, within which State he resides, and an inhabitant of the Southern District of New York.

II. That on or about the 18th day of July, 1904, your petitioner enlisted in the regular army of the United States for a term of three years as a private in Company C in the Twenty-fifth Regiment of Infantry.

III. That by virtue of such enlistment, under the laws of the United States your petitioner became entitled to receive from the United States, and the United States became bound to pay to your petitioner, the sum of thirteen dollars in each month of the first year of said term and fourteen dollars in each month of the
5¾ third year of said term of enlistment for as long as your petitioner rendered honest and faithful service as a soldier unless sooner discharged from the service in the manner prescribed in and by the laws of the United States.

IV. That your petitioner, from the date of such enlistment, to wit, July 18, 1904, to the 16th day of November, 1906, rendered honest and faithful service to the United States as a private soldier, and your petitioner then and at all times thereafter was ready, willing and able to continue to render such honest and faithful service for the rest of his period of enlistment, to wit, until the 18th day of July, 1907.

V. That in the night of August 13, 1906, a disturbance and breach of the peace occurred in the City of Brownsville, in the State of Texas, commonly known as the "affray at Brownsville," at which city Companies B, C and D, of the First Battalion of said Twenty-fifth United States Infantry, were then stationed in barracks; in the course of which disturbance a citizen of said community was killed and another wounded and private property damaged.

VI. That thereafter and on or about the 28th day of August, 1906, charges and specifications in writing were preferred against your petitioner by First Lieutenant Clay M. Supplee; a battalion adjutant of the Twenty-sixth United States Infantry, in words and figures as follows, to wit:

"*Charge.*—Conduct to the prejudice of good order and military discipline in violation of the sixty-second article of war.

Specification.—In that Private Oscar W. Reid, Company C, Twenty-fifth Infantry, did without authority take from the barracks of his or other company, stationed at Fort Brown, Texas, one magazine rifle, caliber .30, model 1903, and did singly or in company with other party or parties unknown take part in a disturbance in the streets of Brownsville, Tex., in which disturbance one citi-
6 zen of said town was killed and another wounded by loading with ball cartridges and firing said rifle in said streets of said town and causing damage to property of inhabitants of said town. This on or about August 13, 1906.

H. CLAY M. SUPPLEE.
First Lieutenant, Battalion Adjutant, Twenty-sixth Infantry, Officer Preferring Charge."

That your petitioner was never tried before any court-martial or other tribunal on said charges or other issue and never given any opportunity to be heard in this own defense, but was placed in confinement at Fort Brown, Texas, on August 14th, and there kept until August 25th, 1906, when your petitioner was transferred to Fort Sam Houston, Texas, and there kept in confinement until his dismissal from the service of the United States, as hereinafter set forth.

VII.—That thereafter, on the 9th day of November, 1906, a certain pretended order was issued by the War Department of the United States under the direction of the President of the United States, but wholly without warrant of law, the material portions of which order in so far as the same relate to your petitioner are as follows, to wit:

WAR DEPARTMENT,
WASHINGTON, *November* 9, 1906.

Special Orders No. 266.

1. By direction of the President, the following named enlisted men who on August 13, 1906, were members of Companies B, C and D, Twenty-fifth Infantry certain members of which organizations participated in the riotous disturbance which occurred in Brownsville, Tex., on the night of August 13, 1906, will be discharged without honor from the Army by their respective commanding offi-
7 cers and forever debarred from re-enlisting in the army or navy of the United States as well as from employment in any civil capacity under the Government:

Company B, Twenty-fifth Infantry.

First Sergt. Mingo Sanders; Q. M. Sergt. Walker McCurdy; Sergts. James R. Reid, George Jackson and Luther T. Thornton; Corpls. Jones A. Coltrane, Edward L. Daniels, Ray Burdett, Wade H. Watlington and Anthony Franklin; Cooks Leroy Horn and Solomon Johnson; Musician Henry Odom; Privates, James Allen, John B. Anderson, William Anderson, Battier Bailey, James Bailey, Elmer Brown, John Brown, William Brown, William J. Carlton, Harry Carmichael, George Conn, John Cook, Charles E. Cooper, Boyd Convers, Lawrence Daniel, Carolina de Saussure, Ernest English, Shepherd Glenn, Isaac Goolsby, William Harden, Charlie Hairston, John Holomon, James Johnson, Frank Jones, Henry Jones, William J. Kernan, George Lawson, Willie Lemons, Samuel McGhee, George W. Mitchell, Isaiah Raynor, Stansberry Roberts, William Smith, Thomas Taylor, William Thomas, Alexander Walker, Edward Warfield, Julius Wilkins, Alfred N. Williams, Brister Williams, and Joseph L. Wilson.

Company C, Twenty-fifth Infantry.

Q. M. Sergt. George W. McMurray, Sergts. Samuel W. Harley, Newton Carlisle, Darby W. O. Brawner and George Thomas, Corpls. Charles H. Madison, Solomon P. O'Neil, Preston Washington, Willie H. Miller and John H. Hill, Cooks George Grier and Lewis J. Baker, Musicians James E. Armstrong and Walter Banks, Artificer Charles E. Rudy, Privates Clifford I. Adair, Henry W. Arvin, Charles W. Askew, Frank Bounsler, Robert L. Collier, Erasmus T. Dabbs, Mark Garmon, George W. Gray, Joseph H. Gray, James T. Harden, George W. Harris, John T. Hawkins, Alphonso Holland, Thomas Jefferson, Edward Johnson, George Johnson, John Kirkpatrick, Edward Lee, Frank J. Lipscomb, West Logan, William Mapp, William McGuire, Jr., Thomas L. Mosley, Andrew Mitchell, James W. Newton, George W. Perkins, James Perry, Oscar W. Reid, Joseph Rogers, James Sinkler, Calvin Smith, George Smith, John
8 Smith, John Streater, Robert Turner, Leartis Webb, Lewis Williams and James Woodson.

Company D, Twenty-fifth Infantry.

First Sergt. Israel Harris; Q. M. Sergt. Thomas J. Green; Sergts. Jerry E. Reeves and Jacob Frazier; Corpls. Temple Thornton, David Powell, Winter Washington, Albert Roland and James H. Ballard; Musicians Hoytt Robinson and Joseph Jones; Cooks Charles Dade and Robert Williams; Artificer George W. Newton; Privates Samuel Wheeler, Charles Hawkins, Henry Barclay, Sam. M. Battle, Henry T. W. Brown, John Butler, Richard Crooks, Strowder Darnell, Elias Gant, James C. Gill, John Green, Alonzo Haley, George W. Hall, Barney Harris, Joseph H. Howard, John A. Jackson, Benjamin F. Johnson, Walter Johnson, Charles Jones, John R. Jones, William E. Jones, William R. Jones, Edward Jordan, Wesley Mapp,

William A. Matthews, James Newton, Elmer Peters, Len Reeves, Edward Robinson, Henry Robinson, Robert L. Rogan, Samuel E. Scott, Joseph Shanks, John Slow, Zachariah Sparks, William Van Hook, Edward Wickersham and Dorsie Willis.

Company A, Twenty-fifth Infantry.

Privates James A. Simmons and August Williams.

Company G, Twenty-fifth Infantry.

Private James Duncan.

Unassigned, Twenty-fifth Infantry.

Private Perry Cisco.

Troop C, Ninth Cavalry.

Privates Alexander Ash, Taylor Stroudemire and Robert James.

Troop H, Tenth Cavalry.

Private John W. Lewis.

The discharge certificate in each case will show that the discharge without honor is in consequence of paragraph 1, Special Orders No. 266, War Department, November 9, 1906. These soldiers are entitled to travel pay.

By order of the Acting Secretary of War:

ARTHUR MURRAY,
Chief of Artillery, Acting Chief of Staff.

Official HENRY P. McCAIN,
Military Secretary."

9 VIII. That thereupon and solely in pursuance of said pretended order of November 9, 1906, a certain document claimed to be a "discharge without honor" was transmitted to your petitioner by the commanding general of the Department of Texas at Reno, Texas, in words and figures as follows, to wit:

Army of the United States.

To all whom it may concern:

Know ye that Oscar W. Reid, a private of Company C of the Twenty-fifth Regiment of Infantry, who was enlisted on the 18th day of July, one thousand nine hundred and four, to serve three years, is hereby discharged without honor from the Army of the United States in consequence of paragraph 1, S. O. 266, War Department, November 9, 1906.

Said Oscar W. Reid was born in Portsmouth in the State of

Virginia, and when enlisted was 21 10/12 years of age, 5 feet 4½ inches high had light blue # 8 eyes, black hair, and was by occupation a waiter.

Given under my hand at Fort Sam Houston, Texas, this 22nd day of November in the year of our Lord one thousand nine hundred and six.

GEO. LEROY BROWN,
Colonel, 26th Infantry, Commanding.

IX. That your petitioner was thereupon commanded by his military superiors to give up his arms and to leave the service of the United States and was thereupon dismissed from the service of the United States, together with other members of said Companies B, C and D.

X. That your petitioner was wholly guiltless of any complicity in any disturbance whatsoever on the night of August 13, 1906, and at the time and place in question was in his company's quarters, and before the said disturbance had ceased and while the shooting was in progress your petitioner, with other members of his company, was present and answered to his name at the roll call of his said company in the company street, and your petitioner had no knowledge whatsoever of said disturbance, commonly known as the "Affray at Brownsville," or who was concerned therein.

XI. That as your petitioner is advised by counsel, the President of the United States was wholly without power to order or cause the discharge of your petitioner under the said pretended order of November 9, 1906, and the said action of the President in ordering your petitioner's discharge, said pretended order and your petitioner's dismissal thereunder were wholly null and void in law and in violation of the rights secured to your petitioner by the Constitution and laws of the United States, and more particularly by virtue of the following provisions thereof, to wit:

By the following provisions of the Constitution of the United States:

Article I, Section 8:

"The Congress shall have Power * * * To raise and support armies * * * To make Rules for the Government and Regulation of the land and naval Forces. * * *"

"To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

Article II, Section 3:

"he" (the President) "shall take Care that the Laws be faithfully executed."

Article VI, paragraph 2:

"This Constitution and the Laws of the United States which shall be made in Pursuance thereof * * * shall be the supreme Law of the Land."

Fifth Amendment:

"No person * * * shall be * * * deprived of * * * liberty or property without due process of law."

11 By the following provisions of the laws of the United States:

United States Revised Statutes, Section 1280:

"The monthly pay of the following enlisted men of the Army shall during their first term of enlistment be as follows:— * * * "privates * * * of infantry thirteen dollars."

Section 1281:

"To the rates of pay stated in the preceding section one dollar per month shall be added for the third year of enlistment. * * *"

Act of August 1, 1894, Section 2:

"That hereafter all enlistments in the Army shall be for the term of three years. * * *"

United States Revised Statutes, Section 1342, "Articles of War":

Art. 62. All crimes not capital, and all disorders and neglects, which officers and soldiers may be guilty of, to the prejudice of good order and military discipline, though not mentioned in the foregoing articles of war, are to be taken cognizance of by a general or regimental, garrison, or field officers court-martial, according to the nature and degree of the offense, and punished at the discretion of such court.

Art. 64. The officers and soldiers of any troops, * * * mustered and in pay of the United States shall, at all times and in all places, be governed by the articles of war, and shall be subject to be tried by courts-martial.

Art. 66. Soldiers charged with crimes shall be confined until tried by court-martial, or released by proper authority.

United States Army Regulations, Section 145:

"A soldier, on his discharge from the service, will be given a certificate of discharge signed by a field officer of his regiment or corps or by the commanding officer when no field officer is present. When more than one field officer of the regiment or corps is present

12 the commanding officer may designate the particular field officer to perform this duty, and in any case the commanding officer may require the discharge to be submitted to him before delivery to the soldier."

Section 146:

"The character given on a discharge will be signed by the company or detachment commander, and great care will be taken that no injustice is done the soldier."

"If the soldier's service has been honest and faithful, he will be entitled to such character as will warrant his reenlistment—that is, to character at least 'good.' Where the company commander deems the service not honest and faithful he shall if practicable so notify the soldier at least thirty days prior to discharge, and shall at the same time notify the commanding officer who will in every such case convene a board of officers, three if practicable to determine whether the soldier's service has been honest and faithful."

"The soldier will in every case be given a hearing before the board."

"If the company commander is the commanding officer, he will report the facts to the next higher commander, who will convene the board. The finding of the board when approved by the convening authority, shall be final. Discharge without honor on account of 'service not honest and faithful' will be given only on the approved finding of a board of officers as herein prescribed."

XII. That no part of the pay due unto your petitioner from the United States from the 16th day of November, 1906, to the 18th day of July, 1907, has ever been paid to or received by your petitioner and by reason of the premises the sum of one hundred and twenty-two dollars and twenty-six cents is now justly due and owing to your petitioner from the United States.

Wherefore your petitioner prays judgment against the United States for the sum of one hundred and twenty-two dollars
13 & 14 and twenty-six cents ($122.26), with his costs, or for such other judgment, order or relief as he may be entitled to receive from this Court.

Dated December 7th, 1907.

WARD, MELLEN & WOODBRIDGE,
Attorneys for Petitioner,
32 *Nassau Street,*
New York City.

SOUTHERN DISTRICT OF NEW YORK,
County of New York, ss:

Oscar W. Reid, being duly sworn, deposes and says that he is the petitioner herein; that he has read the foregoing petition, and that the same is true to the best of his knowledge, information and belief. That no assignment of said claim or any part thereof has been made, and that the petitioner is justly entitled to the full amount named and stated in the petition after allowing all just credits and set-offs, if any.

OSCAR W. REID.

Subscribed and sworn to before me this 7th day of December, 1907.

[SEAL.] JOHN C. McCUSKER,
Notary Public, No. 27, N. Y. County.

15 [Endorsed:] In the District Court of the United States. For the Southern District of New York. Oscar W. Reid *vs.* The United States. (Copy.) Petition. Ward, Mellen & Woodbridge, Attorneys for Petitioner, 32 Nassau Street, Borough of Manhattan, City of New York. Filed Jany 9 1908.

16 United States District Court, Southern District of New York.

OSCAR W. REID, Petitioner,
vs.
UNITED STATES.

Answer.

The defendant, by Henry L. Stimson, United States Attorney for the Southern District of New York, upon information and belief, answers as follows in the petition herein as amended:

For a First Defense.

First. As to Paragraphs II and III of the petition, defendant alleges that the terms of the enlistment of the petitioner correctly appear from the petitioner's enlistment papers subscribed and sworn to by the petitioner pursuant to law, of which papers a copy is hereto annexed marked Schedule A.

Second. As to Paragraph IV, defendant denies the allegations and each of them therein contained.

Third. As to Paragraph VI, defendant denies the allegation that petitioner was never tried by any tribunal nor given any opportunity to be heard in defence so far as that allegation relates to any charge other than that specifically set forth in said paragraph; and as to said charge so specifically set forth, defendant alleges that it was never prosecuted.

17 Fourth. As to Paragraph VII, defendant denies that the order therein referred to was other than a real and valid order issued pursuant to law.

Fifth. As to Paragraph VIII, defendant denies that the discharge therein referred to was other than a real and valid discharge issued pursuant to law; and defendant further denies that the words "without honor" which appear in the said discharge were emphasized therein as they are printed in the petition or otherwise, the said words being merely a part of the usual and ordinary form of discharge under the circumstances.

Sixth. As to Paragraph X, defendant denies that it has any knowledge or information sufficient to form a belief as to whether the petitioner was guiltless of any direct complicity in the crimes in question, or knew the facts of the said crimes or who was concerned therein; and defendant denies on information and belief that the petitioner with or without other members of his company, was present and answered to his name at any roll-call of his said company before the cessation of the disturbance and the shooting, or the essential part thereof.

Seventh. As to Paragraph XI, defendant reiterates the allegations made in Paragraph First of the answer; and particularly in reference to the various provisions of law recited in the said paragraph, defendant alleges that the discharge of the petitioner was not in any

respect made by way of punishment; and defendant respectfully suggests the following provisions of the Constitution and the law, under and pursuant to which, among others, the said order was issued:

Constitution. Art. II, Sec. 2.

"The president shall be commander-in-chief of the army and navy of the United States."

Revised Statutes, Sec. 1342, 4th Article of War.

"Art. 4. No enlisted man duly sworn shall be discharged from the service without a discharge in writing signed by a field officer
18 of the regiment to which he belongs, or by the commanding officer when no field officer is present; and no discharge shall be given to any enlisted man before his term of service has expired, except by order of the President, the Secretary of War, the commanding officer of his department, or by sentence of a general court-martial."

Army Regulations, Art. XXI, Sec. 138.

"An enlisted man will not be discharged before the expiration of his term except:

1. By order of the President or Secretary of War.

2. By sentence of a general court-martial or military commission.

3. On certificate of disability, or under rules governing discharge by purchase, by direction of the commander of a territorial department or army in the field.

4. In compliance with an order of one of the United States courts, or a justice or a judge thereof, on a writ of *habeas corpus*."

Army Regulations, Art. XXI, Sec. 148, Paragraph 2.

"The blank for discharge without honor when a soldier is discharged:

(*a*) Without trial, on account of fraudulent enlistment.

(*b*) Without trial, on account of having become disqualified for service, physically or in character, through his own misconduct.

(*c*) On account of imprisonment under sentence of a civil court.

(*d*) Where the service has not been honest and faithful; that is, where the service does not warrant his re-enlistment.

(*e*) When discharge without honor is specially ordered by the Secretary of War for any other reason."

Army Regulations, Art. LXVII, Sections 864, 865.

"§ 864. As soon as practicable, and within six days after
19 he has been accepted on probation, the following form of enlistment will be signed by and oath administered to the recruit.

STATE OF ....., *County of* ....., *ss:*

I, ..., born in ..... in the State of ....., aged ..... years and ..... months, and by occupation a ....., do hereby acknowledge to have voluntarily enlisted (or reenlisted) this ..... day of ....., 190...., as a soldier in the Army of the United States of America, for the period of three years, unless sooner discharged by proper authority; and do also

agree to accept from the United States such bounty, pay, rations, and clothing as are or may be established by law. And I do solemnly swear (or affirm) that I will bear true faith and allegiance to the United States of America; that I will serve them honestly and faithfully against all their enemies whomsoever; and that I will obey the orders of the President of the United States, and the orders of the officers appointed over me, according to the Rules and Articles of War.

..... [SEAL.]

Subscribed and duly sworn to before me this .....day of ....., A. D. 190...

.....

Recruiting Officer.

This oath may be administered by any commissioned officer of the Army.

"§ 865. Such of the Articles of War as relate specially to the duties and rights of enlisted men and the penalties for military crimes will be plainly read and, so far as necessary explained to each recruit just before administering to him the oath of enlistment. Within six days thereafter the Articles of War will be read to the recruit."

Eighth. As to Paragraph XII, defendant denies there is due or owing from it to the petitioner any sum of money whatever.

For a Second Defense.

20 Ninth. Defendant suggests to the Court that it has no jurisdiction of this suit by reason of the provisions of Section 2 of the Act of March 3, 1887, ch. 359 (24 St. L., 505), as amended by the Act of June 27, 1898, ch. 503.

For a Third Defense.

Tenth. Defendant reiterates the allegations herein above contained in Paragraph First of this answer.

Eleventh. On or about August 16, 1906, the President of the United States received from a committee of prominent citizens of Brownsville, Texas, a telegram dated August 15-16, 1906, of which a copy is hereto annexed, marked Schedule B.

Twelfth. Thereupon the President directed full report to be made to him upon the subject of the said telegram.

Thirteenth. On August 16, 1906, there was made by the Military Secretary, Acting Secretary of War, to the Secretary to the President and transmitted by him to the President a report, a copy of which is hereto annexed, marked Schedule C.

Fourteenth. As stated in the telegram referred to in said Schedule C, Major Penrose, the commanding officer, made an investigation upon which he made a report reiterating the conclusions stated by him in the said telegram. The said report was in due course transmitted to the President.

Fifteenth. On August 18, 1906, Major Blockson, Inspector General, arrived at Brownsville, Texas, pursuant to orders, and began an investigation which continued until August 29, 1906; and upon the latter date he rendered a report together with very voluminous transcripts of the evidence taken by him. A copy of the principal report, which is hereto annexed, marked Schedule D, was forthwith transmitted to the President.

21 Sixteenth. On September 6, 1906, there was made and forwarded to the Attorney General, and by him in due course transmitted to the President, a report of an investigation of the subject which was made by A. C. Hamilton, Esq., Assistant United States Attorney, in which, among other things, the said Assistant United States Attorney reported that he and the other officials were "impressed with the difficulty of identifying any of the culprits," and that "the chances are that unless the soldiers clean up their own quarters or turn State's evidence, no conviction can ever be had of the guilty who have caused the disturbance and trouble."

Seventeenth. On October 4, 1906, Lieutenant L. A. Lovering, acting Inspector General, having made an investigation on the subject pursuant to instructions, made a report in which he reported the petitioner as among the men present in Fort Brown at said Brownsville on the night of August 13, 1906. This report was in due course transmitted to the President.

Eighteenth. On October 4, 1906, the Acting Secretary of War, by direction of the President, issued to Brigadier General E. A. Garlington, Inspector General of the United States Army, an order of which a copy is hereto annexed, marked Schedule E.

Nineteenth. Accordingly, General Garlington proceeded to make the investigations directed, and on October 22, 1906, he submitted his report which was duly transmitted to the President, and of which a copy is hereto annexed, marked Schedule F.

Twentieth. The person in this report referred to under the name of "Reed" and as "Private Reid" is the petitioner herein, and the said person was among the persons examined by General Garlington in the manner and with the result which in the report is stated.

Twenty-first. After full consideration of all these various investigations and reports as well as of other similar investigations
22 and reports and after being advised and believing that the crimes under consideration were beyond question committed by a considerable group of members of the said regiment and after exhausting without result every means known to him for discovering the identity of such guilty men, and after being advised and believing that the identity of such men must in the nature of things be known to the major portion of the regiment the President did finally on November 5, 1906, issue an order, of which a copy is hereto annexed, marked Schedule G.

Twenty-second. Accordingly, on November 9, 1906, Special Order No. 266 was duly issued in the form alleged in Paragraph VII of the Petition herein.

Twenty-third. Thereupon there was delivered to the petitioner a

document of which a copy is hereto annexed, marked Schedule H, and the petitioner was thereupon discharged without honor.

Twenty-fourth. The said order of the President and the said discharge were made not as punishment of the petitioner or of others, but for the good of the service and for the maintenance of the morale of the Army and to the end that there should be in the Army of the United States only such troops as the President in his judgment could absolutely rely upon and safely quarter under arms among the people of the United States.

Twenty-fifth. In so ordering without court martial the discharge without honor of the petitioner and of the other soldiers mentioned in Special Order No. 266, the President acted pursuant to precedents of the Army established by cases, illustrative instances of which were stated in memoranda submitted by the Military Secretary of War on December 5, 1906, and December 10, 1906, respectively. Copies of said memoranda are annexed hereto marked Schedule J.

Twenty-sixth. On the 12th day of December, 1907, there was duly issued an order of which a copy is hereto annexed, marked Schedule K.

23 Twenty-seventh. On the 15th day of January, 1907, there was duly issued an order, a copy of the pertinent portion of which is hereto annexed, marked Schedule L.

Wherefore, the defendant prays that the petition herein be dismissed, together with the costs and disbursements of this action.

HENRY L. STIMSON,
United States Attorney, Southern District of New York.

Office & P. O. Address, Room 50, P. O. Building, Borough of Manhattan, City of New York.

STATE OF NEW YORK,
Southern District of New York, ss:

Winfred T. Denison, being duly sworn, deposes and says that he is an Assistant to the United States Attorney for the Southern District of New York and Attorney for the defendant herein; that he has read the foregoing answer and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true; that the reason why this verification is not made by the defendant in person is, that it is a corporation sovereign; that the sources of deponent's information and the grounds of his belief, are, among other things, official documents and records and duly authenticated transcripts thereof in and from the Office of the War Department of the United States.

WINFRED T. DENISON.

Sworn to before me this 8th day of April, 1908.

FREDERICK L. CAMPBELL,
Notary Public, Kings Co.

Cert. filed in N. Y. Co.

24 SCHEDULE A.

THE UNITED STATES OF AMERICA.

STATE OF ILLINOIS,
City or Town of Chicago, ss:

I, Oscar W. Reid, born in Portsmouth, in the State of Virginia, aged twenty-one years and ten months, and by occupation a waiter, do hereby acknowledge to have voluntarily enlisted this eighteenth day of July, 1904, as a soldier in the Army of the United States of America, for the period of three years unless sooner discharged by proper authority: And do also agree to accept from the United States such bounty, pay, rations, and clothing as are or may be established by law. And I do solemnly swear (or affirm) that I will bear true faith and allegiance to the United States of America, and that I will serve them honestly and faithfully against all their enemies whomsoever; and that I will obey the orders of the President of the United States, and the orders of the officers appointed over me, according to the Rules and Articles of War.

OSCAR W. REID. [SEAL.]

Subscribed and duly sworn to before me this 18th day of July, A. D. 1904.

J. C. DENT,
Lieut.-Colonel, 24th Infantry,
Recruiting Officer.

Enlisted for the 25th Infantry, Ft. Niobrara, Nebr., per telegram, A. G. O., dated Washington, July 16, 1904.

NOTE.—Indelible or permanent marks found upon the person of a Recruit will be here noted: 2 S. forehead, S. I. arm, S. I. thigh, r. knee, 2 S. l. knee, 2 S. each shin, V. S. l. arm, 2 S. l. hand back, 1 S. l. calf.

25 I certify that I have carefully examined the above-named man agreeably to the General Regulations of the Army, and that, in my opinion, he is free from all bodily defects and mental infirmity which would, in any way, disqualify him from performing the duties of a soldier.

W. E. PURVIANCE,
Capt. and Ass't Surgeon U. S. A.,
Examining Officer.

I certify that I have minutely inspected the above-named man, Oscar W. Reid, previous to his enlistment, and that he was entirely sober when enlisted; that to the best of my judgment and belief, he fulfills all legal requirements; and that I have accepted and enlisted him into the service of the United States under this contract of enlistment as duly qualified to perform the duties of an able-bodied soldier, and, in doing so, have strictly observed the regulations which

govern the Recruiting service. This soldier has Blue 8 eyes, Black hair, Light complexion, is 5 feet 4½ inches high.

J. C. DENT, [SEAL.]
Lieut-Colonel, 24th Infantry, Recruiting Officer.

(A. G. O., No. 11, November 7, 1903.)

Declaration of Recruit.

I, Oscar W. Reid, desiring to enlist in the Army of the United States for the term of three years, do declare that I have neither wife nor child; that I am of the legal age to enlist, and believe myself to be physically qualified to perform the duties of an able-bodied soldier; and I do further declare that I am of good habits and character in all respects, and have never been discharged from the United States service (Army or Navy) or any other service on ac-
26 count of disability, or through sentence of either civil or military court, nor discharged from any service, civil or military, except with good character, and for the reasons given by me to the recruiting officer prior to this enlistment. And that I am a citizen of the United States.

Given at Chicago, Illinois, this fourteenth day of July, 1904.

OSCAR W. REID.

Witness:
MIKE HELDMAN.

Residence of soldier: New York City.

Name and address of person to be notified in case of emergency, giving degree of relationship; if friend, so state: (Uncle) W. H. Bourke, 708 Crawford St., Portsmouth, Va.

SCHEDULE B.

BROWNSVILLE, TEX., *August* 15-16, 1906.

Theodore Roosevelt, President of the United States, Washington, D. C.:

The undersigned, a committee of citizens appointed at and by a mass meeting of the people of Brownsville, held in the federal courthouse in this city, on Tuesday, the 14th instant, to investigate *the attack made* on the city by *negro troops* now stationed at Fort Brown, adjoining the city, after an almost continuous session of two days find as follows:

That at a few moments before midnight on Monday, the 13th a body of United States soldiers of Twenty-fifth United States Infantry (colored), numbering between 20 and 30 men, emerged from the garrison inclosure, carrying their rifles and abundant supply of ammunition, and also begun firing in town and directly into dwellings, offices, stores, and at police and citizens. During this firing one citizen, Frank Natus, was killed in his yard, and the lieutenant of

police, who rode toward the firing, had his horse killed under
27 him and was shot through the right arm, which has since been amputated at the elbow. After firing about 200 shots the soldiers retired to their quarters. After the most diligent inquiry we find that no shots were fired from the town into or toward the garrison, nor any provocation given for the attack. We find that negro soldiers who have been stationed here only a few weeks have taken exception to the fact that they have been refused liquor in the saloons at the same bars or counters as the white citizens, and that a few days ago a negro soldier was knocked down for rudely jostling a white woman, the wife of a federal officer, off the sidewalk.

We solemnly assert that no other provocation in any shape or manner has been given to these soldiers since their arrival here. We find that threats have been made by them that they will repeat this *outrage*. We do not believe their officers can restrain them, there being but five commissioned officers. Our condition, Mr. President, is this: Our women and children are terrorized and our men are practically under constant alarm and watchfulness. No community can stand this strain for more than a few days. We look to you for relief; we ask you to have the troops at once removed from Fort Brown and replaced by white soldiers. We appeal to you as Commander in Chief and as President of our whole people.

JOHN BARTLETT,
County Judge.
FRANK W. KIBE,
City Attorney.
CELEDONCE GARZA,
Sheriff.
E. H. GOODRICH,
Superintendent Public Instruction.
GEORGE CONNOR,
Chief of Police.
JOHN G. FERNANDEZ,
Banker.
FREDERICK J. COMBE,
Mayor.
JAMES A. BROWNE,
Alderman.
J. H. FLORENCE,
State Quarantine Officer.
J. O. WHEELER,
Editor Daily Herald.
WILLIAM KELLY,
Chairman Citizens' Committee.

28 SCHEDULE C.

WAR DEPARTMENT,
WASHINGTON, *August* 16, 1906.

Hon. William Loeb, Jr., Secretary to the President, Oyster Bay, N. Y.

MY DEAR SIR: In response to your letter of to-day, transmitting a telegram, addressed to the President by citizens of Brownsville, Tex., relative to an attack alleged to have been made on that city by negro troops now stationed at Fort Brown, adjoining the city, I beg leave to advise you that a telegram of inquiry, based upon the press reports of yesterday morning, was sent yesterday to the commanding officer at Fort Brown, Tex. A telegram, of which a copy follows, was received from that officer this afternoon:

BROWNSVILLE, TEX., *August* 16, 1906.

The Military Secretary, War Department, Washington, D. C.:

Reference your telegram yesterday, a shooting occurred in Brownsville about 12.10 morning of 14th, in which one civilian was killed and the chief of police wounded in right arm, which had to be amputated. Believe shooting was done by enlisted men of this post, but have not as yet been able to detect guilty party. Am conducting most thorough investigation possible and working in perfect harmony with Citizens' Committee and Mayor of Brownsville. Guard of one-third of garrison, one company, constantly on duty. All enlisted men confined strictly to post, and no one allowed to enter but Mayor, members of Citizens' Committee, and those having official business. Conditions well in hand by both Mayor and myself. No trouble since shooting, and anticipate none. Full facts reported to department commander by wire and mail.

PENROSE,
Commanding.

No further information with regard to the occurrence has been received here, but instructions have been telegraphed to the
29 commanding general, Department of Texas, to make telegraphic report of the facts in the case, or of any change in the situation at the earliest possible date. As soon as any further information with regard to the matter is received it will be forwarded to you.

Very respectfully,

F. C. AINSWORTH,
The Military Secretary, Acting Secretary of War.

SCHEDULE D.

BROWNSVILLE, TEX., *August* 29, 1906.

SIR: I have the honor to report investigation of trouble caused by soldiers of Twenty-fifth Infantry, midnight, August 13. I arrived at Brownsville the night of August 18.

Appended are copies of telegrams and letters of Major Penrose, marked A to D; telegrams sent by me, A′ to F′; affidavits of noncommissioned officers in charge of quarters, etc., A″ to F″; testimony taken by citizens' committee, etc., A‴ to B‴. They present a fair account of the occurrence.

I examined privately the five officers present when trouble occurred (Major Penrose, Captains Lyon and Macklin, Lieutenants Grier and Lawrason, all of Twenty-fifth Infantry), all men who made affidavits, etc., A″ to F″ (as well as post noncommissioned staff, a number of old noncommissioned officers in each company, etc.), all important witnesses in A‴ to B‴, Mayor Combe, Mr. Dominguez, Mr. and Mrs. Evans, etc. I interviewed nearly all prominent officials—Federal, State, and county—saloon keepers, and other citizens of all classes. I examined the houses, interviewing inmates, of Messrs. Cowan, Randall, Starck, and Yturria, observing where shots entered and left; also saloon where bartender was killed and a number of other buildings having bullet marks.

The committee invited by Major Penrose to investigate (referred to in D′) practically delegated its authority to Captain McDonald of State Rangers, who is also a detective. He was given every assistance by the commanding officer. He served the warrants the first time.

Causes.

1. The soldiers heard they were not to go to Camp Mabry because Texas Troops had threatened to use ball cartridges against them in maneuvers. They knew Colonel Hoyt made a request that the Twenty-fifth be not sent to Texas.

2. The people did not desire the colored troops and thought they should not be sent here. I learned this before the rumored abandonment of Brown from prominent citizens, members of the committee of safety, etc. I think requests were sent to Senators, Congressmen, etc., to use their influence in the matter, but I am not positive. If a fact, it is probably known at the War Department.

3. Soldiers of the Twenty-fifth were not allowed to drink with white people at the principal bars in town, though in some cases saloon keepers put up a separate bar for their use, this having an opposite effect to that intended. The bartender was killed in such a saloon.

4. Tate-Newton, Baker-Reed cases, etc. (see B and B‴). Tate-Newton case was that of a party of ladies standing on street sidewalk; claimed that two colored soldiers rudely jostled them. Mr. Tate, inspector of customs, husband of one of the ladies, knocked down one

of the soldiers with his revolver. The ladies were obstructing the sidewalk, although anybody could have easily gotten by them. The soldier was rude and probably insulting in his manner. Tate's remedy was too drastic. It was "in the manner of the South." He told me he would have used it against any man—white or black. Mr. Vann, collector of customs, invited Major Penrose to assist at an investigation of this case, but latter had no time after the
31 13th. Reed and another colored soldier were at ferry landing, having returned from Matamoros. Mr. Baker, inspector of customs, claimed they were drunk and disorderly (confirmed by an unprejudiced witness); that he told them to move on, and finally pushed one, who fell off plank walk into mud and water about knee-deep, more through his condition than strength of the push. Baker probably used more force than he acknowledged. Facts in these two cases were exaggerated on both sides and increased the bitter feeling between soldiers and citizens. I heard of several cases of threats from both sides before the 13th, but believe them manufactured.

5. Case of Mrs. Evans (see B). There is no doubt she was seized by the hair and thrown violently to the ground by a tall negro soldier, who then ran away through fear of people close by. This incident, occurring on the 12th, inflamed and infuriated the people very much. The canceling of passes, sending out patrols, etc. probably increased the resentment of the soldiers against people of Brownsville.

The Raid Into Town.

From the evidence obtainable I believe the first shots were fired between B Company barracks and the wall separating post from town. A number were fired into the air for the purpose of creating an alarm. The soldiers, 9 to 15, possibly more, then jumped the wall and started through town. There is no reliable evidence to support the claim that the first shots came from town, and no bullet marks were found on barracks. From their direction, etc., I am sure three shots through Mr. Yturria's house came from a point near the center of B Company's upper back porch. A Mexican boy sleeping on the floor of the Yturria porch said they were among the first fired.

Mr. Randall lives over the telegraph office opposite post gate. A bullet went through his sitting room; it came from a point
32 near the wall opposite southwestern end of C Company barracks. Some of the first shots fired also came from the vicinity of D Company barracks. The line of barracks of D, B, and C Companies runs northeast to southwest. The wall between post and town is parallel to and about 75 feet northwest of line of barracks. An alley through town, perpendicular to wall, beginning at a point nearly opposite space between B and D Company barracks, was the line of operations (about three blocks in length).

The raiders first struck Cowan's house (at end of first block). There were two women and five children in it. It is a miracle some of them were not shot. The raiders could not help knowing they

had not yet gone to bed. About [illegible] shots were fired, nearly all going through house at a height of 4½ feet or less above floor. One shot put out the lamp sitting on a table. Mrs. Cowan has been on the verge of hysterics ever since. It is said the Cowan children had made fun of "the nigger soldiers;" but I could not pin down the reports. There must be some truth in them. The lieutenant of police, Dominguez, heard the firing and rode toward it, accompanied by two policemen. Near corner of Miller Hotel (end of second block) the two policemen turned back, but Dominguez kept on, and the raiders started firing upon him. He said there were about fifteen colored soldiers in the party. He was mounted on a white horse and went half a block after reaching corner of hotel, when his horse fell dead, shot through the body several times. The raiders were probably at the corner and continued firing on the fleeing man until horse fell. Dominguez was shot in right arm (afterwards amputated below the elbow). He did not even draw his revolver from holster. A number of shots were also fired at the other two policemen. Dominguez, many years on the police force is universally respected. The raiders fired seven or eight times into the Miller Hotel, including several shots at a guest sitting by a window. After shooting Dominguez they divided. One party proceeded along the alley. Frank Natus, bartender in Tillman's saloon (about two-thirds the way down third block), heard them coming and started to close the back door, but was shot and probably instantly killed about 20 feet from door. A Mexican in the saloon, Preciado by name, was slightly wounded in the hand by a bullet which passed through his coat. Natus had never had any trouble with the soldiers, as far as known. Five or six shots were fired through that back door. This party tried to get into the back door of another saloon, but it was closed.

33

The other party went half a block to the right, then turned to the left and fired five or six shots into Mr. Starck's house (second from corner on street parallel to alley), evidently mistaking it for Tate's (which is third). Bullet marks in Starck's house are higher than in Cowan's. Mrs. Starck said two shots went through mosquito bar over bed in which she and two children were sleeping. These were the last attacks, and raiders then probably ran back. Bullet marks were found on several other houses in vicinity of those already mentioned.

None of the individual raiders was recognized. Streets are poorly lighted, and it was a dark night. Those who saw them were busy trying to keep out of sight themselves. The soldiers were comparative strangers in town, having arrived only two weeks before. That the raiders were soldiers of the Twenty-fifth Infantry can not be doubted. The evidence of many witnesses of all classes is conclusive. Shattered bullets, shells, and clips found are merely corroborative.

Responsibility Before and During the Fact.

I do not think the commanding and other officers and some of the senior uncommissioned officers can be blamed for not discovering the preconcerted raid. It is easy to say in the light of later events,

that the guard should have been doubled and other precautions taken the night of the 13th, but who could imagine that American soldiers in a body would try to murder unoffending women and innocent children?

34 The commanding officer did cancel passes and send out patrols early in the evening—as much to allay the anger of town people as to prevent men from committing other excesses. It may be interesting to note here that troops were paid on the 11th.

All the officers firmly believed (most of them till morning) the garrison was attacked from the town side as a result of the assault on Mrs. Evans, the general ill feeling of town people, etc., and this delusion was heightened by the call to arms sounded by order of the sergeant of the guard (probably too early during the firing to be genuine). As a consequence, the raiders were not suspected by their officers and had an easy time getting back; while arm racks were opened with difficulty in the dark, preparations made for defense, etc., cleaning the rifle requires a few minutes only.

Major Penrose is indefinite in his statement as to time command was paraded (see A). It was at least ten minutes after first shots were fired; probably longer. Captain Macklin, officer of the day, says he went to bed between twenty and ten minutes to midnight, very much fatigued, and slept through all the uproar until about 1 a. m. The first shots were fired a few minutes before midnight. It is singular the members of the guard sent to wake him up could not find him, although, as far as he is concerned, I found no reason to doubt his statement.

Responsibility After the Fact.

I think Major Penrose, as soon as he believed the criminals were soldiers, should have arrested and placed in solitary confinement Sergeant Jackson, B Company (senior sergeant present in company, as well as in charge of quarters), Sergeant Reid, B Company (sergeant of the guard), private Howard, D Company (sentinel around barracks), and Scavenger Tamayo (at B Company water-closet, next the wall, when firing began). It is very probable that proper effort

35 would have induced one or more of these men to tell what he knew. The soldiers are among those arrested, but not the scavenger, although I recommended him to the district attorney.

Major Penrose has conducted himself in a manly way under trying circumstances, although subjected to much undeserved abuse. Almost the only criticism against him is that above. The officers appeared to be trying to find the criminals, but it is certainly unfortunate, for the reputation of the battalion, that they have as yet hardly discovered a single clue to such a terrible preconcerted crime, committed by so many men. I believe the battalion had an excellent reputation up to the 13th of August, but the stain now upon it is the worst I have ever seen in the Army. Many of its old soldiers who had nothing to do with the raid must know something tangible

as to identity of the criminals. If they do not disclose their knowledge they should be made to suffer with others more guilty, as far as the law will permit.

Recommendation.

If satisfactory evidence concerning identity of the criminals does not come from members of the battalion before a certain date, to be fixed by the War Department, I recommend that all enlisted men of the three companies present on the night of August 13 be discharged the service and debarred from reenlistment in the Army, Navy or Marine Corps.

Later Events.

The following men were arrested by the civil authorities on the 23d and placed in guardhouse for safe-keeping:

Sergeant Jackson, B Company, Twenty-fifth Infantry, in charge of quarters; Sergeant Brawner, C Company, Twenty-fifth Infantry, in charge of quarters; Sergeant Reid, B Company, Twenty-fifth Infantry, sergeant of the guard; Corporal Powell, D Company, Twenty-fifth Infantry, in charge of quarters; Corporal Miller, C Company, Twenty-fifth Infantry, on pass; Corporal Madison, C Company, Twenty-fifth Infanty, on pass; Private Howard, D Company, Twenty-fifth Infantry, sentinel on No. 2; Private Newton, C Company, Twenty-fifth Infantry, knocked down by Mr. Tate; Private Reed, C Company, Twenty-fifth Infantry, pushed into mud and water by Mr. Baker; Private Gill, D Company, Twenty-fifth Infantry, with Reed when pushed by Baker; Private Askew, C Company, Twenty-fifth Infantry, cap found in town, alleged to be his; Private Hollowman, B Company, Twenty-fifth Infantry, part owner of saloon in Tenderloin.

An ex-soldier named Allison, partner with Hollowman, was also arrested on the 22d and placed in guardhouse for safe-keeping. He is still there.

The noncommissioned officers in charge of quarters were responsible for gun racks, and had keys thereto in their personal possession. It will be seen by examining the note after each name that these men were arrested chiefly on suspicion. I believe the majority of them are guilty on one or more counts, but there is little prospect of conviction on evidence thus far obtained.

The order to take rail for Fort Reno was suspended on morning of the 24th, and in the afternoon orders were received for the battalion to go by way of San Antonio and to take military prisoners along to be turned over to commanding officer, Fort Sam Houston, for safe-keeping until brought before a grand jury. Captain McDonald late that afternoon demanded the prisoners. Major Penrose, who had just informed Judge Welch of his latest orders sent McDonald a letter declining to give them up (see D). McDonald would not acknowledge the authority, and Judge Welch finally withdrew the warrants to avoid bloodshed. I believe he threatened Mc-

Donald with arrest for contempt before the latter gave them up. It is possible McDonald might have fought the entire battalion with his four or five rangers were their obedience as blind as his obstinacy. It is said here he is so brave he would not hesitate to "charge hell with one bucket of water." The warrants were then served by Sheriff Garza. On being informed of the latest orders he gave up the struggle.

37 The battalion left Brownsville with the military prisoners at 6.30 a. m., August 25.

I met many sterling people in Brownsville. The majority of good business men recognize the proper ethics of the situation, but many others of a somewhat lower class think the colored soldier should be treated like the negro laborer of the South. It must be confessed the colored soldier is much more aggressive in his attitude on the social equality question than he used to be.

Very respectfully,

A. P. BLOCKSOM,
Major, Inspector-General.

The Military Secretary, Southwestern Division.
(Through Headquarters Department of Texas.)

SCHEDULE E.

WAR DEPARTMENT,
WASHINGTON, *October* 4, 1906.

Brig. Gen. E. A. Garlington, Inspector-General, United States Army.

SIR: The President directs that you proceed to the places named in the accompanying letter and endeavor to secure information that will lead to the apprehension and punishment of the men of the Twenty-fifth Infantry believed to have participated in the riotous disturbance which occurred in Brownsville, Tex., on the night of the 13th of August, 1906, resulting in the death of one and the wounding of another citizen of that city.

You are authorized to call upon the commanding general, Southwestern Division, and the commanding officers of Fort Sam Houston and Fort Reno in the prosecution of this investigation for such assistance as it may be within their power to give.

38 The President authorizes you to make known to those concerned the orders given by him in this case, namely:

If the guilty parties can not be discovered, the President approves the recommendation that the whole three companies implicated in this atrocious outrage should be dismissed and the men forever debarred from reenlisting in the Army or Navy of the United States.

And in this connection the President further authorizes you to make known to those concerned that unless such enlisted men of the Twenty-fifth Infantry as may have knowledge of the facts relating to the shooting, killing, and riotous conduct on the part of the men with the organizations serving at Fort Brown, Tex., on the night of

the 13th of August, 1906, report to you such facts, and all other circumstances within their knowledge which will assist in apprehending the guilty parties, orders will be immediately issued from the War Department discharging every man in Companies B, C, and D of the Twenty-fifth Infantry, without honor, and forever debarring them from reenlisting in the Army or Navy of the United States, as well as from employment in any civil capacity under the Government.

The time to be given to the enlisted men of Companies B, C, and D, Twenty-fifth Infantry, for consideration of this ultimatum will be determined by you. If at the end of the time designated the facts and circumstances of the occurrence in question have not been established sufficiently clearly to indicate a reasonable certainty of securing a conviction of the guilty parties by evidence obtained from enlisted men of the First Battalion, Twenty-fifth Infantry, you will report the condition by wire to The Military Secretary.

Very respectfully,

ROBERT SHAW OLIVER,
Acting Secretary of War.

39 SCHEDULE F.

WAR DEPARTMENT,
OFFICE OF THE INSPECTOR-GENERAL,
WASHINGTON, *October* 22, 1906.

SIR: I have the honor to submit the following report of an investigation made at Fort Sam Houston, Tex., and Fort Reno, Okla., pursuant to the following letter of instructions: [As printed in Schedule E].

I proceeded from Washington to the headquarters of the Southwestern Division, Oklahoma City, Okla., to consult with Maj. A. P. Blocksom, inspector-general, who had, under orders from the commanding general Southwestern Division, made an exhaustive investigation of the affair at Fort Brown, Tex., of August 13, 1906, and who had submitted on August 29, 1906, a full report of the circumstances connected therewith (1157577). As a result of this consultation, nothing new was developed beyond the fact that on October 4, 1906, Lieut. Col. Leonard A. Lovering, inspector-general Southwestern Division, made an investigation at Fort Reno, Okla., into certain collateral circumstances connected with the trouble at Fort Brown, by direction of the commanding general Southwestern Division. Copy of this report is appended. No material facts germane to the main issue were developed by this investigation.

I then proceeded to the headquarters, Department of Texas, Fort Sam Houston, Tex., for the purpose of examining the men of the Twenty-fifth Infantry confined in the guardhouse at that place for whom warrants had been issued at Brownsville immediately after the affair of August 13. On the eve of my departure from Washington I had received papers informing me that the grand jury in Brownsville, Tex., had failed to find true bills against these prisoners. I examined each of the prisoners very carefully, first, in the form of general conversation, referring to the personal

history of the man, including the place of birth, home, former
40 occupation, and relations in civil life. I found several of them had lived in localities with which I was more or less familiar, one having lived at my own home, and then subjected them to a rigid examination. As soon as the subject of the trouble at Brownsville was introduced the countenance of the individual being interviewed assumed a wooden, stolid look, and each man positively denied any knowledge of the circumstances connected with or individuals concerned in the affair. Under close inquiry it was admitted by each man that he knew of the discrimination made by saloon keepers against the enlisted men of the Twenty-fifth Infantry; that he knew Newton had been hit by a revolver in the hands of a citizen of Brownsville, and that Reed had been pushed into the mud by another citizen.

Each man admitted that these occurrences had been talked of and discussed within their hearing in the barracks of their respective companies, but I could extract no admission from any man that this discrimination and these acts of violence had caused any feeling of animosity on the part of the enlisted men of the Twenty-fifth Infantry against citizens of Brownsville. When this attitude on the part of the enlisted men under examination was developed, it became apparent that I could get no information from them that would assist me in locating the men actually guilty of the firing on the night of the 13th of August, 1906. I spent several hours in this interview with the men, taking each separately and immediately afterward separating him from the rest of the prisoners, so that there might be no communication between them during the examination. The next morning I called the men before me again, four at a time, beginning with the men of the longest service. I again talked with them, endeavoring to elicit information, and upon failure to succeed I notified them of the orders of the President in the case and gave them until 5 o'clock that afternoon to consider the matter. At the time set I received nothing from them.

The men confined in the Fort Sam Houston guard-house
41 were the noncommissioned officers holding the keys of the arm racks of the respective companies, the sergeant of the guard, and the sentinel on post in rear of company barracks on the night of the 13th of August, 1906; an enlisted man, part owner of a saloon in Brownsville; a man whose cap was alleged to have been found in the city on the night of the 13th of August (not substantiated); Private Newton, who had been assaulted; Private Reed, who had also been assaulted, and the men who were with him at the time.

From Fort Sam Houston I proceeded to Fort Reno, Okla. I called together the officers present at the station who were on duty with the Fort Brown battalion on the night of August 13, 1906. I discussed with them the means and methods employed by them, contemporaneously with the occurrence and subsequently, to locate the guilty individuals. I found that absolutely nothing had been discovered; that they had found no enlisted men who would admit any

knowledge of the shooting or of any circumstances, immediate or remote, connected with the same.

I then called before me, individually, a number of the enlisted men, noncommissioned officers, and privates of long service in the Twenty-fifth Infantry, ranging from twenty-six years to five or six. I proceeded with them practically along the same lines as with the prisoners at Fort Sam Houston, and found the same mental attitude on their part; could discover absolutely nothing that would throw any light on the affair, and received the same denial that any feeling of animosity or spirit of revenge existed among the enlisted men of the Twenty-fifth Infantry against the citizens of Brownsville on account of discrimination against them in the way of equal privileges in saloons or on account of the two acts of violence against their comrades. Each man questioned admitted that he knew of these acts of violence; each had heard it talked of in his barracks; but each denied that any feeling was displayed at any time by individuals of the respective companies or by the enlisted men of the com-
42 panies as a whole. I could get no explanation of this apparent indifference to the indications of hostility that such acts on the part of the citizens of Brownsville disclosed, except in one instance where a sergeant of the company to which Private Newton belonged, said: The fact that Newton had been assaulted made no special impression upon him, because Newton was liable to get into a row almost any time and had been battered up on previous occasions at Fort Niobrara.

The uniform denial on the part of the enlisted men concerning the "barrack talk" in regard to these acts of hostility upon the part of certain citizens of Brownsville indicated a possible general understanding among the enlisted men of this battalion as to the position they would take in the premises, but I could find no evidence of such understanding. The secretive nature of the race, where crimes charged to members of their color are made, is well known. Under such circumstances self-protection or self-interest is the only lever by which the casket of their minds can be pried open. Acting upon this principle, the history and record of the regiment to which they belong, the part played by these old soldiers in this record, were pointed out and enlarged upon. The odium and disgrace to the battalion and to its individual members by this crime were indicated. The future effect upon the individuals and upon the battalion as a whole was referred to; and, finally, the concern of the President of the United States in the matter, his desire and the desire of the War Department to separate the innocent from the guilty were explained; all without effect.

The next day the battalion was paraded without arms, every officer and enlisted man being present except two men sick in hospital. The battalion was formed in convenient arrangement. I then addressed them, stating who I was, namely, the Inspector-General of the Army, sent there by order of the President of the United States to afford the men of the Twenty-fifth Infantry an opportunity to give such information as might be within their power that would lead to the

detection of the few men guilty of the crime of firing during
43 the night upon citizens of a sleeping town, and talked to them along the same lines as I had done to the old soldiers; and, in conclusion, read to them the orders of the President and of the Acting Secretary of War in the premises. I informed them that they would be given until 9 o'clock the next day to consider the matter, and that I would be accessible during that limit to any soldier who possessed information and had a desire to make it known. Only one man presented himself, and that was *not* to give information, but to urge his own case for exemption from the penalty imposed by the President, but still disclaiming any knowledge of the affair and stating his inability to make any discovery connected therewith; this was First Sergt. Mingo Sanders, Company B, Twenty-fifth Infantry—a man with twenty-six years' service.

I decided upon a short period for the consideration of the ultimatum given because I thought it more probable to bring results. Two months had elapsed since the occurrence on the very day I made the ultimatum known, and it appeared to me that further time for reflection was unnecessary, and that the time limit set by me would be more likely to convince the men that the penalty in case of failure was sure to follow; whereas if a longer period had been given it might have impressed them with the idea that it was made more in the nature of a threat for effect.

The following men of the Twenty-fifth Infantry were not in the vicinity of the post on the night of the firing, the 13th of August, 1906: Private Ruby Wilson, Company B, absent sick; Sergt. William Blaney, Company B, on furlough; Private Charles W. Johnson, Company B, on furlough; Private Lewis C. Owens, Company B, absent sick; Artificer Thomas H. Jones, Company B, detached service at Fort Sill, Okla., First Sergt. William Turner, Company C, at Fort Sill, Okla.; Corpl. John Young, Company C, absent at Kansas City, Mo.; Private James Williams, Company C, absent at Fort
44 Bayard, N. Mex.; Sergt. George Derrett, Company D, detached service, Fort Sill, Okla.

The following changes have occurred in the companies of the battalion since August 13, 1906: Private Samuel R. Hopkins, Company B, discharged by expiration of service; Private Robert James, Company C, discharged by expiration of service, reenlisted for the Ninth Cavalry; Private Joseph Carter, Company C, discharged by expiration of service; Private John W. Lewis, Company C, discharged by expiration of service, reenlisted in Tenth Cavalry; Private Perry Cisco, Company C, discharged by expiration of service, reenlisted in the Tenth Cavalry; Private James A. Simmons, Company C, transferred to Company A, Twenty-fifth Infantry; Private August Williams, Company C, transferred to Company A, Twenty-fifth Infantry; Private Taylor Stoudemire, Company D, discharged by expiration of service, reenlisted in Ninth Cavalry; Cook James Duncan, Company D, discharged by expiration of service, reenlisted in Second Battalion, Twenty-fifth Infantry; Fort Bliss, Tex.; Private Alexander Ash, Company D, discharged by expiration of service, reenlisted in Ninth Cavalry; Sergt. Jacob Frazier, Company D, dis-

charged by expiration of servi . reenlisted in company—on furlough; Private Chester Garrard, Company D, discharged by expiration of service; Private Luther Cotton, Company D, discharged by expiration of service; Private Henry H. Davis, Company D, discharged by expiration of service; Private William H. Birdsong, Company D, discharged by expiration of service; Private John Henry, Company D, deserted.

Conclusion.

I recommend that orders be issued as soon as practicable discharging, without honor, every man in Companies B, C, and D of the Twenty-fifth Infantry, serving at Fort Brown, Tex., on the night of August 13, 1906, and forever debarring them from reenlisting in the Army or Navy of the United States, as well as from
45 employment in any civil capacity under the Government. In making this recommendation I recognize the fact that a number of men who have no direct knowledge as to the identity of the men of the Twenty-fifth Infantry who actually fired the shots on the night of the 13th of August, 1906, will incur this extreme penalty.

It has been established, by careful investigation, beyond reasonable doubt, that the firing into the houses of the citizens of Brownsville, while the inhabitants thereof were pursuing their peaceful vocation of sleeping, and by which one citizen was killed and the chief of police so seriously wounded that he lost an arm, was done by enlisted men of the Twenty-fifth Infantry belonging to the battalion stationed at Fort Brown. After due opportunity and notice, the enlisted men of the Twenty-fifth Infantry have failed to tell all that it is reasonable to believe they know concerning the shooting. If they had done so, if they had been willing to relate all the circumstances—instances preliminary to the trouble—it is extremely probable that a clue sufficiently definite to lead to results would have been disclosed. They appear to stand together in a determination to resist the detection of the guilty; therefore they should stand together when the penalty falls. A forceful lesson should be given to the Army at large, and especially to the noncommissioned officers, that their duty does not cease upon the drill ground, with the calling of the company rolls, making check inspections, and other duty of formal character, but that their responsibilities of office accompany them everywhere and at all times; that it is their duty to become thoroughly acquainted with the individual members of their respective units; to know their characteristics; to be able at all times to gauge their temper, in order to discover the beginning of discontent or of mutinous intentions, and to anticipate any organized act of disorder; that they must notify their officers at once of any such conditions. Moreover, the people of the United States, wherever they live, must feel assured that the men wearing the uniform of the Army are their protectors, and not midnight assassins or
46 riotous disturbers of the peace of the community in which they may be stationed.

No absolutely accurate verification of the rifles and men of the

battalion was made on the night of the 13th of August in time to account for all the rifles or all the men at the beginning of the firing or immediately upon its conclusion. This failure is explained as follows: The commanding officer and his associates, when the alarm was sounded and they heard the firing, assumed that it came from the city of Brownsville, and that the guns were in the hands of civilians; in other words, that the garrison was being fired into from the outside by civilians. It does not appear to have occurred to any of them that certain enlisted men of the Twenty-fifth Infantry had possession of their arms, and were committing the crime of firing into the houses and upon the citizens of Brownsville until the mayor of the city came into the garrison and informed the commanding officer, Major Penrose that one man had been killed and another wounded by his soldiers.

I return herewith all the papers in the case.

Very respectfully,

E. A. GARLINGTON,
Inspector-General.

The Military Secretary, War Department.

SCHEDULE G.

THE WHITE HOUSE,
WASHINGTON, *November* 5, 1906.

The Secretary of War:

I have read through General Garlington's report, dated October 22, submitted to me by you. I direct that the recommendations of General Garlington be complied with, and that at the same time the concluding portion of his report be published with our sanction as giving the reasons for the action.

THEODORE ROOSEVELT.

47 SCHEDULE H.

Special Orders, No. 266.

WAR DEPARTMENT,
WASHINGTON, *November* 9, 1906.

Extract.

1. By direction of the President, the following-named enlisted men who on August 13, 1906, were members of Companies B, C, and D, Twenty-fifth Infantry, certain members of which organizations participated in the riotous disturbance which occurred in Brownsville, Tex., on the night of August 13, 1906, will be discharged without honor from the Army by their respective commanding officers and forever debarred from reenlisting in the Army or Navy of the United States, as well as from employment in any civil capacity under the Government:

Company B, Twenty-fifth Infantry.

First Sergt. Mingo Sanders; Q. M. Sergt. Walker McCurdy; Sergts. James R. Reid, George Jackson, and Luther T. Thornton; Corpls. Jones A. Coltrane, Edward L. Daniels, Ray Burdett, Wade H. Watlington, and Anthony Franklin; Cooks Leroy Horn and Solomon Johnson; Musician Henry Odom; Privates James Allen, John B. Anderson, William Anderson, Battier Bailey, James Bailey, Elmer Brown, John Brown, William Brown, William J. Carlton, Harry Carmichael, George Conn, John Cook, Charles E. Cooper, Boyd Conyers, Lawrence Daniel, Carolina De Saussure, Ernest English, Shepherd Glenn, Isaac Goolsby, William Harden, Charley Hairston, John Holomon, James Johnson, Frank Jones, Henry Jones, William J. Kernan, George Lawson, Willie Lemons, Samuel McGhee, George W. Mitchell, Isaiah Raynor, Stansberry Roberts, William Smith, Thomas Taylor, William Thomas, Alexander Walker, Edward Warfield, Julius Wilkins, Alfred N. Williams, Brister Williams, and Joseph L. Wilson.

48 Company C, Twenty-fifth Infantry.

Q. M. Sergt. George W. McMurray; Sergts. Samuel W. Harley, Newton Carlisle, Darby W. O. Brawner, and George Thomas; Corpls. Charles H. Madison, Solomon P. O'Neil, Preston Washington, Willie H. Miller, and John H. Hill; Cooks George Grier and Lewis J. Baker; Musicians James E. Armstrong and Walter Banks; Artificer Charles E. Rudy; Privates Clifford I. Adair, Henry W. Arvin, Charles W. Askew, Frank Bomsler, Robert L. Collier, Erasmus T. Dabbs, Mark Garmon, George W. Gray, Joseph H. Gray, James T. Harden, George W. Harris, John T. Hawkins, Alphonso Holland, Thomas Jefferson, Edward Johnson, George Johnson, John Kilpatrick, Edward Lee, Frank J. Lipscomb, West Logan, William Mapp, William McGuire, Jr., Thomas L. Mosely, Andrew Mitchell, James W. Newton, George W. Perkins, James Perry, Oscar W. Reid, Joseph Rogers, James Sinkler, Calvin Smith, George Smith, John Smith, John Streater, Robert Turner, Leartis Webb, Lewis Williams and James Woodson.

Company D, Twenty-fifth Infantry.

First Sergt. Israel Harris; Q. M. Sergt. Thomas J. Green; Sergts. Jerry E. Reeves and Jacob Frazier; Corpls. Temple Thornton, David Powell, Winter Washington, Albert Roland, and James H. Ballard; Musicians Hoytt Robinson and Joseph Jones; Cooks Charles Dade and Robert Williams; Artificer George W. Newton; Privates Samuel Wheeler, Charles Hawkins, Henry Barclay, Sam M. Battle, Henry T. W. Brown, John Butler, Richard Crooks, Strowder Darnell, Elias Gant, James C. Gill, John Green, Alonzo Haley, George W. Hall, Barney Harris, Joseph H. Howard, John A. Jackson, Benjamin F. Johnson, Walter Johnson, Charles Jones, John R. Jones, William E. Jones, William R. Jones, Edward Jordan, Wesley

Mapp, William A. Matthews, James Newton, Elmer Peters,
49 Len Reeves, Edward Robinson, Henry Robinson, Robert L. Rogan, Samuel E. Scott, Joseph Shanks, John Slow, Zachariah Sparks, William Van Hook, Edward Wickersham and Dorsie Willis.

Company A, Twenty-fifth Infantry.

Private James A. Simmons and August Williams.

Company G, Twenty-fifth Infantry.

Private James Duncan.

Unassigned, Twenty-fifth Infantry.

Private Perry Cisco.

Troop C, Ninth Cavalry.

Privates Alexander Ash, Taylor Stroudemire, and Robert James.

Troop H, Tenth Cavalry.

Private John W. Lewis.

The discharge certificate in each case will show that the discharge without honor is in consequence of paragraph 1, Special Orders, No. 263, War Department, November 9, 1906. These soldiers are entitled to travel pay.

* * * * * * *

By order of the Acting Secretary of War:

ARTHUR MURRAY,
Chief of Artillery, Acting Chief of Staff.

Official:

HENRY P. McCAIN,
Military Secretary.

SCHEDULE J.

Memorandum for the Secretary of War.

The Secretary to the President, in a letter dated December 1, 1906, advises the Secretary of War that the President would like to have him "look up any precedents (Lee's or others) for the
50 action taken in discharging the battalion of the Twenty-fifth Infantry, and if there exist any such, send them to the President."

A protracted examination of the official records has thus far resulted in failure to discover a precedent in the Regular Army for

the discharge of those members of three companies of the Twenty-fifth Infantry who were present on the night of August 13, 1906, when an affray in the city of Brownsville took place.

The case referred to as "Lee's" by the Secretary to the President is undoubtedly the case of Company G, Eighth Infantry, concerning which an interview with Mr. J. C. Hesse was recently published in the Washington Post. In that interview it was stated, by order of Lieut. Col. Robert E. Lee, the members of Company G were transferred to other companies of the same regiment and prohibited from reenlisting on the expiration of the terms of enlistment under which they were then serving. A search for papers containing details of the occurrence has resulted in failure to find them, the original papers having been returned in 1860 to the Department of Texas, where they were undoubtedly lost or destroyed at the time of the surrender of the troops in that department to the Confederate military authorities.

The records show, however, that on March 18, 1860, members of Company G, Eighth Infantry, at Fort Davis, Tex., took from the guardhouse a citizen who was confined there and, without opposition from the guard, hanged him to a tree nearby until he was dead. The records also show that by order of the regimental commander 27 men of this company were detached from the company and attached to other companies of the regiment, "to restore their discipline," and that 12 other men of the company were transferred to other companies by order of the regimental commander without the cause of transfer being stated. The regimental orders are not on file, and it is impossible to state whether the reenlistment of these transferred men was or was not prohibited; but as the records
51 show that some of the transferred men did reenlist, it is evident that if an order prohibiting their reenlistment was given it was not carried into effect.

In view of the foregoing statement it will be seen that the action taken in 1860 in the case of Company G, Eighth Infantry, is not a precedent for the action taken in 1906 in the case of members of the Twenty-fifth Infantry.

In the volunteer service during the civil war there occurred numerous instances of the summary discharge of large numbers of men because of misconduct on their part. Following are some of those instances:

The members of Company A, First Eastern Shore Maryland Infantry Volunteers, were mustered out of service August 16, 1862, by order of the general commanding the Eighth Army Corps because they refused to serve in Virginia.

The members of Company K, First Eastern Shore Maryland Infantry Volunteers, were dishonorably discharged, without trial, July 2, 1863, pursuant to the order of the general commanding the Eighth Army Corps, subject to the approval of the Secretary of War, for refusing to leave the section of the State in which it was claimed that they had enlisted to serve. The action was approved by the Secretary of War, July 23, 1863.

The First Regiment, United States Reserve Corps (Missouri In-

fantry), was mustered out of service during September and October, 1862, pursuant to orders of the War Department, on account of the regiment being in a state bordering closely on mutiny as a result of alleged misunderstanding as to the terms of enlistment.

Companies H, I, and K, Fifth Missouri Cavalry, and Company G, Fourth Missouri Cavalry, were mustered out of the service of the United States without trial by court-martial, in pursuance of orders from headquarters District of Missouri, dated September 20, 1862, by reason of mutinous conduct and disaffection of the majority of the members of those companies.

Company C, Fremont Body Guard, was summarily dis-
52 charged by order of Major-General Halleck, November 30, 1861, on account of the members refusing to be consolidated with any other organization of Missouri volunteers.

The members of Company G, Tenth New Jersey Infantry Volunteers, were discharged without trial, April 8, 1862, pursuant to orders from the War Department, because they refused to do duty as infantry, claiming that they were deceived into the belief that they were entering the cavalry branch when they enlisted.

The Eleventh Regiment, New York Infantry Volunteers (First Fire Zouaves), was mustered out of service June 2, 1862, pursuant to orders from the War Department, by reason of general demoralization, numerous desertions, and at the request of officers and enlisted men of the organization.

The Sixtieth Regiment, Ohio Infantry Volunteers, was summarily discharged November 10, 1862, pursuant to a telegram from the War Department, because the regiment was "disorganized, mutinous, and worthless."

F. C. AINSWORTH,
The Military Secretary.

War Department,
The Military Secretary's Office, December 5, 1906.

Memorandum for the Secretary of War.

The Secretary to the President, in a letter dated December 7, 1906, advises the Secretary of War that the President wishes him to give him some instances, of which he knows there must be many, where the Department, the commanding generals of departments, or colonels of regiments have discharged men or mustered them out without honor in any other way without court-martial."

A memorandum, furnished by The Military Secretary to the Sec-
53 retary of War and by him transmitted to the Secretary to the President on the 5th instant, contained a list of a number of instances of the summary discharge from the volunteer service during the civil war of large numbers of men because of misconduct on their part.

No record of the summary discharge from the Regular Army, prior to the recent discharge of a battalion of the Twenty-fifth Infantry, of a considerable number of enlisted men at one time has been found.

Cases of the discharge of individual enlisted men without honor, and without trial by court-martial, are not infrequent. The official records show that during the fiscal year ended June 30, 1906, discharges without honor were ordered by the War Department, without trial by court-martial, in the cases of 352 enlisted men of the Regular Army. Of these, 86 were discharged on account of "fraudulent enlistment," 113 on account of "desertion," 8 on account of "desertion and fraudulent enlistment," 107 on account of "imprisonment under sentence of civil court," and 38 on account of "having become disqualified for service through own misconduct."

In addition to the discharges without honor ordered by the War Department, a considerable number of the discharges issued by subordinate military authorities must, under paragraph 148 (2-d), Army Regulations, have been discharges without honor. That paragraph requires the blank form for discharge without honor to be used when a soldier is discharged: "(*d*) Where the service has not been honest and faithful; that is, where the service does not warrant his reënlistment." The number of such discharges can not be ascertained without an examination of the record of each of the many enlisted men who were discharged during the year. Such an extended examination has not been made, because it is believed that the foregoing statement with regard to the discharges without honor ordered by the War Department is sufficient to show the
54 general practice of the Department with regard to such discharges.

F. C. AINSWORTH,
The Military Secretary.

War Department,
The Military Secretary's Office, December 10, 1906.

SCHEDULE K.

WAR DEPARTMENT,
THE MILITARY SECRETARY'S OFFICE,
WASHINGTON, *December* 12, 1906.

To All Recruiting Officers:

Applications to reënlist from former members of Companies B, C, and D, 25th Infantry, who were discharged under the provisions of Special Orders, No. 266, War Department, November 9, 1906, must be made in writing and be accompanied by such evidence, also in writing, as the applicant may desire to submit to show that he was neither implicated in the raid on Brownsville, Texas, on the night of August 13, 1906, nor withheld any evidence that might lead to the discovery of the perpetrators thereof. Recruiting officers to whom such former soldiers may apply for reënlistment will advise them of these requirements and will forward the applications, when properly prepared to The Military Secretary of the Army for the consideration and investigation of the War Department.

[1190224, M. S. O.]

By order of the Secretary of War:

[SEAL.]

F. C. AINSWORTH,
The Military Secretary.

55 & 56 SCHEDULE L.

Special Orders, No. 12.

WAR DEPARTMENT,
WASHINGTON, *January* 15, 1907.

* * * * * * *

14. By direction of the President, so much of paragraph 1, Special Orders, No. 266, War Department, November 9, 1906, relating to certain members of Companies B, C, and D, 25th Infantry, as debars them "from employment in any civil capacity under the Government" is revoked. (1157577 A 17—M. S. O.).

* * * * * * *

By Order of the Secretary of War:

J. FRANKLIN BELL,
Brigadier-General, Chief of Staff.

Official:
HENRY P. McCAIN,
Military Secretary.

57 [Endorsed:] In the District Court of the United States for the Southern District of New York. Oscar W. Reid, Petitioner, *vs.* The United States. (Copy.) Answer. Henry L. Stimson, United States Attorney, Room 50, P. O. Building, New York City. Filed April 9, 1908.

58 In the District Court of the United States for the Southern District of New York.

OSCAR W. REID, Petitioner,
against
THE UNITED STATES.

Oscar W. Reid, the petitioner herein, by Mellen & Woodbridge, his attorneys, demurs to the third defense contained in the answer filed herein by the United States to the petition herein, being so much of said answer as is contained in the part thereof entitled "For a Third Defense" and embraced in paragraphs thereof numbered Tenth to Twenty-seventh inclusive, upon the ground that it is insufficient in law upon the face thereof.

MELLEN & WOODBRIDGE,
Attorneys for Petitioner, 32 Nassau Street, Borough of Manhattan, the City of New York.

Endorsed: Demurrer filed April 14, 1908.

59 I hereby certify that the foregoing demurrer is in my opinion well founded in point of law.

CHASE MELLEN,
Of Counsel for Petitioner.

STATE OF NEW YORK,
County of New York, Southern
District of New York, ss:

Francis Woodbridge, being duly sworn, says:
I am one of the attorneys for the petitioner herein. The foregoing demurrer is not interposed for delay. This affidavit is made by me rather than by the petitioner because the petitioner is not now within the County of New York or the Southern District of New York, wherein I reside at 15 West Eighth Street, New York City, and have my office at No. 32 Nassau Street.

FRANCIS WOODBRIDGE.

Sworn to before me this 14th day of April, 1908.
[SEAL.] PAUL E. WHITTEN,
Notary Public, Westchester County.

Certificate filed in New York County.

60 District Court of the United States, Southern District of New York.

OSCAR W. REID, Petitioner,
vs.
UNITED STATES.

Upon Demurrer to Answer, in Action under the Tucker Act (of March 3, 1887, 24 Stat., 505).

On July 18, 1904, the petitioner enlisted as a soldier in the Army of the United States and took oath to serve as such soldier "for the period of three years unless sooner discharged by proper authority." This enlistment oath together with Reid's application to enlist and the record of his physical examination constitute his enlistment papers; which embody whatever contract was made between him and the United States in respect of his engagement as a soldier.

He was assigned to the 25th Infantry, and on August 13, 1906 was stationed, with a battalion of his regiment, at Fort Brown, which is in or contiguous to Brownsville, Texas.

61 During the night of August 13-14, certain persons repeatedly discharged firearms in the streets of Brownsville. The firing was apparently at random, but resulted in the killing of one man and the wounding of several others. It was the general, if not the universal belief of the citizens of Brownsville, that this murderous riot was perpetrated by certain soldiers of the Twenty-fifth. The disturbance was first investigated by an Inspector General under orders from the Military Secretary, and later upon the President's own order by the Inspector General of the Army. This officer reported that in his opinion it had been established by careful investigation that the random firing aforesaid had been done by unidentified enlisted men of the 25th Infantry belonging to the garrison of Fort

Brown. He further reported that the enlisted men of that command had failed to tell all it was reasonable to believe they knew concerning the riot, and concluded that "they (said enlisted men) appeared to stand together in a determination to resist the detection of the guilty." Upon the submission and approval of this report, an order was issued by the President's direction on November 9, 1906, requiring the discharge without honor of practically all the enlisted men comprising the Garrison of Fort Brown.

The men so discharged were by said order debarred from re-enlisting in the Army or Navy, but they were granted travel pay and by a subsequent order of December 12, 1906 re-enlistment applications were permitted if made in writing accompanied by evidence that the applicant had not been implicated in the riot aforesaid nor withheld any evidence that might lead to the discovery of the perpetrators thereof. Such applications, however, were to be submitted to the War Department for consideration and investigated before action could be taken by recruiting officers.

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Reid having received his discharge under these circumstances, brings this petition to recover the pay and emoluments which would have accrued to him from the date of such discharge to the expiration of his three-year term of enlistment, and inasmuch as he brings suit under the Tucker Act it is necessarily implied that claim is asserted upon a "contract express or implied with the Government of the United States, or for damages * * * in a case not sounding in tort in respect of which * * * he would be entitled to redress against the United States either in a court of law, equity or admiralty if the United States were suable."

A separate defence contained in the answer sets forth at length the documents supporting the statement hereinabove made, and avers that the "order of the President and the said discharge (of Reid) were not made as punishment of the petitioner or of others, but for the good of the service and for the maintenance of the morale of the Army." To this defence there is a general demurrer.

Mellen & Woodbridge for petitioner;

Henry L. Stimson, U. S. Attorney, opposed.

63 HOUGH, *D. J.*:

Several matters discussed at bar must be laid aside as immaterial to the disposition of this cause.

Whether Reid or his comrades or any of them were guilty of the riotous disturbance in question; or whether Reid personally committed any infraction of good order or military discipline, or whether he is in fact a desirable soldier; or knew or withheld anything tending toward the discovery of the perpetrators of the Brownsville riot; or whether so far as Reid or others are concerned the President's action was unnecessarily severe, cruel or unjust;—are questions beyond this judicial investigation.

The material inquiries seem to me very few. The nature of a soldier's contract of enlistment has been sufficiently treated *In re Grimley*, 137 U. S., 147. By his contract Reid assumed the burden

of military service not for a definite time but for three years "unless sooner discharged by proper authority."

Nothing is expressed in the enlistment papers as to what reasons shall be sufficient for early discharge. And if the engagement be treated merely as a civil contract of hire, the Government would be entitled to dispense with Reid's services under it at any time, provided the authority, *i. e.* the officer directing discharge or dismissal,—be proper."

64 In other words, if enlistment be no more than a hiring by civil contract, under this particular contract the corporate master may discharge the servant whenever he pleases and for or without cause, provided only the officer directing discharge be "proper authority."

I do not give assent to the assertion that a soldier's engagement is or bears much resemblance to a civil contract of hire; but on the assumption (most favorable to petitioner) that it is such a contract, it is on the part of the Government a general contract terminable at will,—if that will be expressed through a proper officer (*Martin vs. New York Life Ins. Co.*, 148 N. Y., 118).

This petitioner was so far as formalities attending his severance from the service are concerned, properly discharged;—that is his discharge paper was correct in form and signature, and so much is not denied. But the "authority" causing and directing his discharge was the President of the United States, who personally gave the order therefor; so that the final question upon assumptions very favorable to petitioner, is whether the President as Commander in Chief of the Army is "proper authority" to terminate *in invitum* a soldier's enlistment?

This question must be answered affirmatively if either (1) there be inherent constitutional authority in the President as Commander in Chief so to do, or (2) there be such authority in the absence of congressional statutory action limiting, defining or regulating the Commander's powers; or if (3) in this case the President acted in accordance with the various acts of Congress regulating the Army and discharges therefrom.

65 As to the first and second of these last queries, no opinion is expressed, because the last question must in my judgment be answered unfavorably to the petitioner.

The articles of war constitute the only statutory declaration concerning discharges from the military service (U. S. Rev. Stat., Sec. 1342).

Article 4 provides * * *

"no discharge shall be given to any enlisted man before his term of service has expired except by order of the President, the Secretary of War, the commanding officer of a department or by sentence of a general court martial";

and this language has remained unchanged in the statutes since 1806.

I am quite unable to perceive how the President's right to terminate a soldier's engagement could be more explicitly recognized, and

indeed conferred,—if recognition seems to imply some antecedent right.

This fourth article of war clearly assumes that discharges must be granted before expiration of service; the power to grant them implies the power to impose them unless a soldier have some rights inherent in his contract or inferable from the nature of his occupation.

This petitioner's contract is civilly but a hiring at the will of the employer, while the nature of his occupation, so far from varying that status has been frequently so judicially defined as to leave no doubt of congressional intent.

66 "The recruit is bound to serve during the full term of his enlistment, but * * * the Government is not bound to continue him in service for a single day, but may dismiss him at the very first moment or at any subsequent period whether with or without cause for so doing."

United States vs. Cottingham, 1 Rob, Va., at 629.

The civil compact usually requires for its dissolution the mutual consent of the parties, but "the military compact may be dissolved at any moment by the supreme authority of the Government." (*U. S. vs. Blakeney* 3 Grat (Va.) at 391; cited *Re* Morrissey, 137 U. S., at 159). And this historical view of the soldier's relation to the Government or the Crown antedates the founding of this nation and is the accepted doctrine of the British military establishment upon which ours was modelled (*Re Tuffnell* L. R., 3 Ch. Div., 173).

Even if, therefore, there be no inherent power of control over the military forces of the nation vested in its constitutional Commander in Chief, and even if also there be no grant of power contained in that title in the absence of congressional gift thereof (concerning which no opinion is expressed only because I do not find the discussion necessary for this case), the statutory grant contained in the fourth article of war must be interpreted in the light of military practices, customs and procedure well known and judicially recognized long before the date of the Revised Statutes and indeed long before the adoption of our earliest articles of war in 1806, and

67 by those customs so recognized and approved by Congress the soldier's engagement was but at the will of the Government which he served, and that Government by authority of Congress speaks through (for the purposes of this case), the President of the United States.

It is, however, further asserted that some infraction of law was wrought by forcing upon Reid a "discharge without honor." The phrase is not known to the statutes; it is found only in the Army Regulations, which are from time to time promulgated by the Secretary of War but do not bind either the Secretary that makes them, and much less the Commander in Chief (*Smith vs. U. S.*, 24 Ct. Cl., 209). The exact method of this soldier's discharge and the *quantum* or kind of character that should be given him not being regulated by statute must necessarily be left in the discretion of the executive officer having power to grant some kind of discharge. That it is beyond the power of the judicial branch to coerce or review the dis-

cretion of the executive is familiar doctrine, while that a discharge with a very bad character is not a punishment to the man discharged within the meaning of any federal statute is settled by *U. S. vs. Kingsley*, 138 U. S., 87.

The demurrer is overruled, and as that portion of the answer demurred to presents in my judgment a complete defence to the petition, final judgment is directed in favor of the Government and against the petitioner, with costs to be taxed.

May 14, 1908.

C. M. HOUGH, *D. J.*

68 At a Stated Term of the United States District Court for the Southern District of New York, held in the United States Court and Post Office Building, in the City of New York, Borough of Manhattan, on the 18 day of May, 1908.

Present: Honorable Charles M. Hough, United States Judge.

OSCAR W. REID, Petitioner,
vs.
UNITED STATES, Defendant.

The issues of law raised by the demurrer of the petitioner to the answer of the defendant herein having come on to be heard on the 4th day of May, 1908, at a term of this Court, after hearing Chase Mellen, Esq., a counsel for the petitioner, in support of the demurrer, and Henry L. Stimson, Esq., United States Attorney, attorney for the defendant, in opposition thereto, now, on motion of Henry L. Stimson, Esq., attorney for the defendant,

It is ordered and adjudged that said demurrer be overruled, and the petitioner having elected to stand on the demurrer, it is further

Ordered and adjudged that the United States have judgment against the petitioner, dismissing the petition on the merits.

C. M. HOUGH,
U. S. District Judge.

Consented to as to form:

(Sig.) MELLEN & WOODBRIDGE,
Attorney- for Petitioner.

Endorsed: Order overruling demurrer filed May 18, 1908.

69 United States District Court, Southern District of New York.

OSCAR W. REID, Petitioner,
vs.
UNITED STATES, Defendant.

The issues of law raised by the demurrer of the petitioner to the answer of the defendant herein, having come on to be heard on the 4th day of May, 1908, before the Honorable Charles M. Hough, at

a Term of this Court, and an order overruling said demurrer and dismissing the petition herein upon the merits having been entered on the 18 day of May, 1908.

Now, on motion of Henry L. Stimson, U. S. Attorney, it is

Ordered, adjudged and decreed that the petition be and it is hereby dismissed upon the merits.

Dated, May 19, 1908.

THOS. ALEXANDER, *Clerk.*

Consented to as to form
(Sgd.) MELLEN & WOODBRIDGE,
Att'ys for Petitioner.

Endorsed: Judgment filed May 19, 1908.

70 In the District Court of the United States for the Southern District of New York.

OSCAR W. REID, Petitioner,
against
THE UNITED STATES, Defendant.

Petition for Writ of Error.

Now comes Oscar W. Reid, petitioner herein, and conceiving himself aggrieved by the judgment entered herein on the 19 day of May, 1908, does hereby pray that a writ of error be allowed from said judgment, returnable to the Supreme Court of the United States, and that a transcript of the record and proceedings and papers upon which said judgment was made, duly authenticated, may be sent to the Supreme Court of the United States, and he presents herewith his assignment of errors.

August 28, 1908.

MELLEN & WOODBRIDGE,
Attorneys for Petitioner, 32 Nassau Street, New York City.

CHASE MELLEN,
FRANCIS WOODBRIDGE,
Counsel.

And now, to wit, on this 1st day of Sept. 1908, it is ordered that the writ of error be allowed as prayed for.

C. M. HOUGH,
United States District Judge.

Endorsed: Petition for writ of error and order allowing same filed Sept. 3, 1908.

71 By the Honorable Charles M. Hough, one of the Judges of the District Court of the United States for the Southern District of New York, in the Second Circuit.

To Henry L. Stimson, Esq., United States Attorney for the Southern District of New York, Attorney for the United States herein, and to the United States, Greeting:

You are hereby cited and admonished to be and appear before the Supreme Court of the United States, at the Capitol, in the city of Washington, in the District of Columbia, on the 18th day of September, 1908, pursuant to a writ of error filed in the clerk's office of the district court of the United States for the southern district of New York, wherein Oscar W. Reid is plaintiff in error, and the United States is defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done in that behalf.

Given under my hand, at the Borough of Manhattan, in the city of New York, in the district and circuit above named, this 1st day of Sept. in the year of our Lord one thousand nine hundred and eight and of the Independence of the United States the one hundred and thirty-third.

C. M. HOUGH,
Judge of the District Court of the United States for the Southern District of New York, in the Second Circuit.

Endorsed: Citation filed Sept. 3d, 1908.

72 Supreme Court of the United States, October Term, 1907.

OSCAR W. REID, Plaintiff-in-Error,
against
THE UNITED STATES, Defendant-in-Error.

Assignment of Errors.

Now comes Oscar W. Reid by his counsel and respectfully represents that he feels aggrieved by the proceedings and judgment of the District Court of the United States for the Southern District of New York in the Second Judicial Circuit in the above entitled cause, and assigns error thereto as follows:

1. That the Court erred in holding that the discharge of the petitioner from the Army of the United States as set forth in the petition and in the paragraphs of the answer numbered Twenty-first, Twenty-second and Twenty-third, was not in violation of that portion of the eighth section of the first Article of the Constitution of the United States, which declares that

"The Congress shall have power * * * to raise and support armies * * *

To make rules for the government and regulation of the
73 land and naval forces;"

2. That the Court erred in holding that the discharge of the petitioner as set forth in the petition and in the paragraphs of the answer numbered Twenty-first, Twenty-second and Twenty-third, was not in violation of the Articles of War enacted by the Congress of the United States, being section 1342 of the United States Revised Statutes.

3. That the Court erred in holding that the discharge of the petitioner as set forth in the petition and in the paragraphs of the answer numbered Twenty-first, Twenty-second and Twenty-third, was authorized by the fourth Article of War.

4. That the Court erred in holding that the discharge of the petitioner as set forth in the petition and in the paragraphs of the answer numbered Twenty-first, Twenty-second and Twenty-third, was not in violation of the third section of the Second Article of the Constitution of the United States, which declares that the President shall "take care that the laws be faithfully executed."

5. That the Court erred in holding that the discharge of the petitioner as set forth in the petition and in the paragraphs of the answer numbered Twenty-first, Twenty-second and Twenty-
74 third, was not in violation of the fifth amendment of the Constitution of the United States which provides

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation."

6. That the Court erred in holding that the discharge of the petitioner as set forth in the petition and in the paragraphs of the answer numbered Twenty-first, Twenty-second and Twenty-third, was not in violation of the provisions of section 1280 of the United States Revised Statutes, which provides that

"The monthly pay of the following enlisted men of the Army shall during their first term of enlistment be as follows: * * * "privates * * * of infantry thirteen dollars."

7. That the Court erred in holding that the discharge of the petitioner as set forth in the petition and in the paragraphs of the answer numbered Twenty-first, Twenty-second and Twenty-third, was not in violation of the provisions of section 1281 of the United States Revised Statutes, which provides

"To the rates of pay stated in the preceding section one
75 dollar per month shall be added for the third year of enlistment * * *"

8. That the Court erred in holding that the discharge of the petitioner as set forth in the petition and in the paragraphs of the answer numbered Twenty-first, Twenty-second and Twenty-third,

was not in violation of the provisions of section 2 of the Act of Congress of August 1, 1894, which provides

"That hereafter all enlistments in the Army shall be for the term of three years * * *"

9. That the Court erred in holding that the discharge of the petitioner as set forth in the petition and in the paragraphs of the answer numbered Twenty-first, Twenty-second, and Twenty-third, was not in violation of the 62d, 64th and 66th Articles of War, being parts of section 1342 of the United States Revised Statutes, which provide:

"Art. 62. All crimes not capital, and all disorders and neglects, which officers and soldiers may be guilty of, to the prejudice of good order and military discipline, though not mentioned in the foregoing articles of war, are to be taken cognizance of by a general or regimental garrison, or field officers' court-martial, according to the nature and degree of the offense, and punished at the discretion of such court.

Art. 64. The officers and soldiers of any troops, * * * mustered and in pay of the United States shall, at all times and in all places, be governed by the articles of war, and shall be subject to be tried by courts-martial.

76 Art. 66. Soldiers charged with crimes shall be confined until tried by court-martial, or released by proper authority."

10. That the Court erred in overruling the demurrer of the petitioner to the third defense in the answer herein.

11. That the Court erred in not sustaining the demurrer to the third defense contained in the answer herein.

12. That the Court erred in holding that the petitioner could be discharged by the President of the United States, for or on account of the offense or offenses with which he was charged or of the commission of which he was suspected, without trial by court-martial.

13. That the Court erred in holding that the petitioner was discharged by proper authority.

14. That the Court erred in not holding that the petitioner's alleged discharge was issued without proper authority.

15. That the Court erred in not holding that the petitioner was discharged without authority or warrant of law and in violation of the statutes in such case made and provided.

77 Wherefore the petitioner prays this honorable Court to examine and correct the errors assigned and that the said judgment of said District Court of the United States for the Southern District of New York be reversed and that he have judgment sustaining the demurrer interposed in his behalf to the third defense contained in the answer of the United States herein, with costs in all the courts, and that he have such further or other relief as to the Court may seem just.

MELLEN & WOODBRIDGE.
Attorneys for Plaintiff in Error, 32 Nassau Street,
Borough of Manhattan, New York City, N. Y.
CHASE MELLEN,
FRANCIS WOODBRIDGE,
Of Counsel.

Endorsed: Assignment of Errors. Filed Sept. 3, 1908.

78 United States District Court, Southern District of New York.

OSCAR W. REID, Petitioner,
against
THE UNITED STATES.

Know all men by these presents, that we, the American Bonding Company of Baltimore, a corporation organized and existing under the laws of the State of Maryland, lawfully transacting business and having an office at No. 84 William Street, Borough of Manhattan, City of New York, are held and firmly bound unto the above named The United States, in the sum of Two Hundred and Fifty ($250) Dollars, to be paid to the said The United States, for the payment of which well and truly to be made, the said American Bonding Company of Baltimore binds itself, its successors and assigns, firmly by these presents.

Sealed with our seal and dated this 28th day of August, one thousand nine hundred and eight.

Whereas, the above named petitioner, Oscar W. Reid, has sued out a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above entitled suit by the judge of the district court of the United States for the southern district of New York.

79 Now, therefore, the condition of this obligation is such that if the above named Oscar W. Reid shall prosecute his writ of error to effect, and answer all damages and costs if he fails to make said writ of error good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

AMERICAN BONDING COMPANY OF BALTIMORE,
By EDWARD B. SOUTHWORTH, Jr.,
Resident Vice President.

Attest:
[SEAL.] WALLACE STEVENS,
Resident Assistant Secretary.

Sealed and delivered, in presence of:
——— ———.

80 Copy.

CITY AND COUNTY OF NEW YORK,
State of New York, ss:

On Aug. 28, 1908 before me personally came Edward B. Southworth, Jr., to me known, who, being by me duly sworn, did depose and say that he resides in the City of New York, that he is the Resident Vice-President of the American Bonding Company of Baltimore, the corporation described in and which executed the within instrument; that he knew the seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so

fixed by order of the Board of Directors of said corporation, and that he signed his name thereto by l...e order; and that the liabilities of said Company do not exceed its assets as ascertained in the manner provided by law. And the said Edward B. Southworth, Jr., further said that he was acquainted with Wallace Stevens and knew him to be the Resident Assistant Secretary of said Company; that the signature of said Resident Assistant Secretary subscribed to the within instrument is the genuine handwriting of the said Resident Assistant Secretary and was subscribed thereto by like order of the Board of Directors, in the presence of him, the said Edward B. Southworth, Jr.

[SEAL.] HULBERT T. E. BEARDSLEY,
Notary Public, New York County.

American Bonding Company of Baltimore.

Extract from minutes of a meeting of the Board of Directors of American Bonding Company of Baltimore, held at the office of the Company, at Baltimore, Maryland, on the 14th day of January, A. D., 1908.

At a regular meeting of the Board of Directors of the American Bonding Company of Baltimore, held in the Office of the Company, at Baltimore, Maryland, on the 14th day of January, A. D., 1908, the following resolution was adopted:

"Resolved, that Hulbert T. E. Beardsley and Edward B. Southworth, Jr., of the city of New York, New York, be and hereby are appointed Resident Vice-Presidents of this Company at New York, New York, and are, and each of them is, hereby authorized and empowered to execute and deliver, and attach the seal of the Company to any and all bonds and undertakings, for or on behalf of the Company in its business of guaranteeing the fidelity of persons holding places of public or private trust and guaranteeing the performance of contracts other than insurance policies, and executing of guaranteeing bonds and undertakings required or permitted in all actions or proceedings by law allowed or required; such guarantee, bonds and undertakings, however, to be attested in every instance by one of the following named persons: Charles H. Worcester, Edward F. Healey, John D. Wareing or Wallace Stevens, who are hereby appointed Resident Assistant Secretaries of this Company at New York City, New York."

I, Wallace Stevens, Resident Assistant Secretary of the American Bonding Company of Baltimore, do hereby certify that the foregoing is a true and correct copy of a resolution of the Board of Directors of the American Bonding Company of Baltimore, and is the whole of said resolution.

In witness whereof, I have hereunto subscribed my name and affixed the seal of the American Bonding Company of Baltimore, at the City of New York, N. Y., Aug. 28, 1908.

[SEAL.] WALLACE STEVENS,
Resident Assistant Secretary.

Statement of the Financial Condition of the American Bonding Company of Baltimore, at the Close of Business, December 31, 1907.

Assets.		Liabilities.	
United States Government Bonds	$52,375.00	Capital Stock	$500,000.00
State and Municipal Bonds	652,843.21	Due for re-Insurance	5,304.25
Railroad and Street Railway Bonds	405,692.50	Legal Reserve	445,194.27
Other Stocks and Bonds	60,860.00	Reserve for Losses and Contingencies	226,212.22
Outstanding Premiums (less commission)	95,981.83	Reserve for 1908 Premium Tax	12,500.00
Accounts Receivable (Secured)	26,250.00	Surplus	251,436.25
Interest Accrued	6,915.77		
Real Estate	6,007.36		
Mortgage Loans	8,000.00		
Cash in Office and Depositories	126,321.30		
	$1,441,246.97		$1,441,246.97

CITY AND COUNTY OF NEW YORK,
State of New York, ss:

I, Edward B. Southworth, Jr., Resident Vice-President of the American Bonding Company of Baltimore, do hereby certify that the foregoing is a true statement of the Assets and Liabilities of said Company at the close of business, December 31, 1907.

In testimony whereof, I hereunto set my hand and affix the seal of the Company Aug. 18, 1908.

EDWARD B. SOUTHWORTH,
Resident Vice-President.

Subscribed and sworn to before me Aug. 28, 1908.

[SEAL.] HULBERT T. E. BEARDSLEY,
Notary Public, New York County.

81 [Endorsed:] 5-24. U. S. District Court, Southern District of New York. Oscar W. Reid, Petitioner, against The United States. Copy. Bond for damages and costs. Mellen & Woodbridge, Attorneys, &c. Filed Sept. 3, 1908. The entire surety is approved as to form and as to the sufficiency of the surety. C. M. Hough, D. J. 9/1/08. The American Bonding Company of Baltimore, 84 William St., Royal Insurance Bldg., New York, Surety.

82 [Endorsed:] U. S. District Court, Southern District of New York. Oscar W. Reid, Plaintiff in Error, *vs.* The United States, Defendant in Error. Record on Return to Writ of Error.

Endorsed on cover: File No. 21,348. S. New York, D. C. U. S. Term No. 552. Oscar W. Reid, plaintiff in error, *vs.* The United States. Filed October 1st, 1908. File No. 21,348.

Office Supreme Court, U. S.
FILED.
OCT 30 1908
JAMES H. McKENNEY,
Clerk

Supreme Court of the United States,

OCTOBER TERM, 1908.

No. 552.

OSCAR W. REID,

Plaintiff in Error,

vs.

THE UNITED STATES.

Motion to Advance.

CHASE MELLEN,
FRANCIS WOODBRIDGE,
Counsel for Plaintiff in Error.

Supreme Court of the United States. 1

OSCAR W. REID, Plaintiff-in-Error, AGAINST THE UNITED STATES.	October Term, 1908. Docket No. 552.

TO THE ATTORNEY GENERAL:

SIR:

Please take notice that upon the Transcript of 2
Record in the above-entitled case, filed in the office of the Clerk of the Supreme Court of the United States at Washington, D. C., on October 1, 1908, and pursuant to the provisions of Rule XXVI of the Rules of the Supreme Court, we shall move this Court on the 26th day of October, 1908, at the court room thereof in the Capitol in the City of Washington, D. C., at the opening of said court on that day, or as soon thereafter as counsel can be heard, that the Court advance the above-entitled case and take the same out of the order on the docket and set the same down for hearing and argument on such day in the month of December, 1908, 3
or such other day, as to the Court may seem just and expedient in the premises. A printed copy of the motion to advance which will be presented to the Court on said day is hereto annexed.

Respectfully,

CHASE MELLEN,
FRANCIS WOODBRIDGE,
Counsel for Plaintiff-in-Error.

Dated October 15, 1908.

4 SUPREME COURT OF THE UNITED STATES.

OSCAR W. REID, Plaintiff-in-Error, AGAINST THE UNITED STATES.	October Term, 1908, No. 552. Motion to Advance Case.

Comes now the plaintiff-in-error herein, Oscar W. Reid, by Chase Mellen and Francis Woodbridge, his counsel, and, under Rule XXVI of this Court,
5 respectfully moves the Court to advance the above-entitled case and to take the same up out of the order on the docket and set the same down for hearing and argument on such day in the month of December, 1908, or such other day, as may to this Court be convenient.

The plaintiff-in-error in support of this motion respectfully shows, upon the Transcript of Record herein:

I.

1. That the plaintiff-in-error on or about July 18, 1904, duly enlisted in the regular Army of the
6 United States for a term of three years as a private in Company C in the Twenty-fifth Regiment of Infantry, as appears from Paragraph II of the Petition, on pages 3, 10 and 15 of the Transcript of Record herein.

2. That the plaintiff-in-error, from the date of said enlistment, to wit, July 18, 1904, to November 16, 1906, rendered honest and faithful service to the United States as a private soldier and was then and at all times thereafter ready, willing and able to

continue to render such honest and faithful service 7
for the rest of his period of enlistment, to wit, until July 18, 1907, as appears from Paragraph IV of the Petition, on page 3 of the Transcript of Record herein.

3. That charges were preferred against the plaintiff-in-error on or about August 28, 1906, that he took part in the so-called Brownsville affray; that he was never tried on them or any other issue, or given opportunity to be heard thereon in his own defense, as appears from Paragraph VI of the Petition, on page 4 of the Transcript of Record herein.

4. That on November 9, 1906, a certain pretended 8
order was issued by the War Department of the United States under the direction of the President of the United States, whereby the plaintiff in-error was discharged without honor from the Army of the United States without any trial before any court-martial or any tribunal whatsoever, as appears from Paragraphs VII, VIII and IX of the Petition, and also from the Answer, on pages 4, 6, 7 and 13 respectively of the Transcript of Record herein, said discharge being wholly without warrant of law and in violation of his rights under the Constitution of the United States and the Articles of War enacted thereunder by the Congress.

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5. That the plaintiff-in-error, as appears from page 3 of the Transcript of Record herein, by petition in the District Court of the United States for the Southern District of New York, brought an action against the United States to recover the pay due him from the Unted States, from November 16, 1906, to July 18, 1907, the date of the termination of said three-year period of enlistment.

6. That in said action the United States interposed an answer, the Third Defense of which set up

the said pretended order of the War Department of the United States made under the direction of the President of the United States, as appears from the parts of the Answer on pages 10 and 12 of the Transcript of Record herein, whereupon plaintiff-in-error demurred thereto, as appears from the Demurrer on page 36 of the Transcript of Record herein. That said demurrer of the plaintiff-in-error was overruled by the District Court of the United States for the Southern District of New York, as appears from the Judgment on page 41 of the Transcript of Record herein, whereupon the plaintiff-in-error brought the cause to this Court by a Writ of Error, as appears from said writ on page 1 of the Transcript of Record herein.

II.

That the principal matter involved in this appeal is the right of the President of the United States, under the Constitution of the United States and the laws enacted thereunder or pursuant thereto by the Congress, arbitrarily and summarily, in time of profound peace, to discharge without honor, or to order the discharge of, without trial before a court martial or other duly constituted tribunal of any sort, a duly enlisted soldier in the regular Army of the United States, before his term of enlistment has expired, without proof of any wrong-doing on his part, and under the circumstances disclosed in the Transcript of Record; said matter is of fundamental interest and importance and of such general public interest to the citizens of the United States that a prompt and authoritative determination by this Court is essential and necessary to the proper administration of justice, and to the due, peaceable and orderly administration of the laws and the government and regulation of the Army of the United States.

The Attorney General, who was consulted before this motion was made, has informed counsel that it will be agreeable to him to have the case advanced so that the argument may take place during the month of December, 1908. 13

Dated, October 26, 1908.

Respectfully submitted,

CHASE MELLEN,
FRANCIS WOODBRIDGE,
Counsel for Plaintiff-in-Error.

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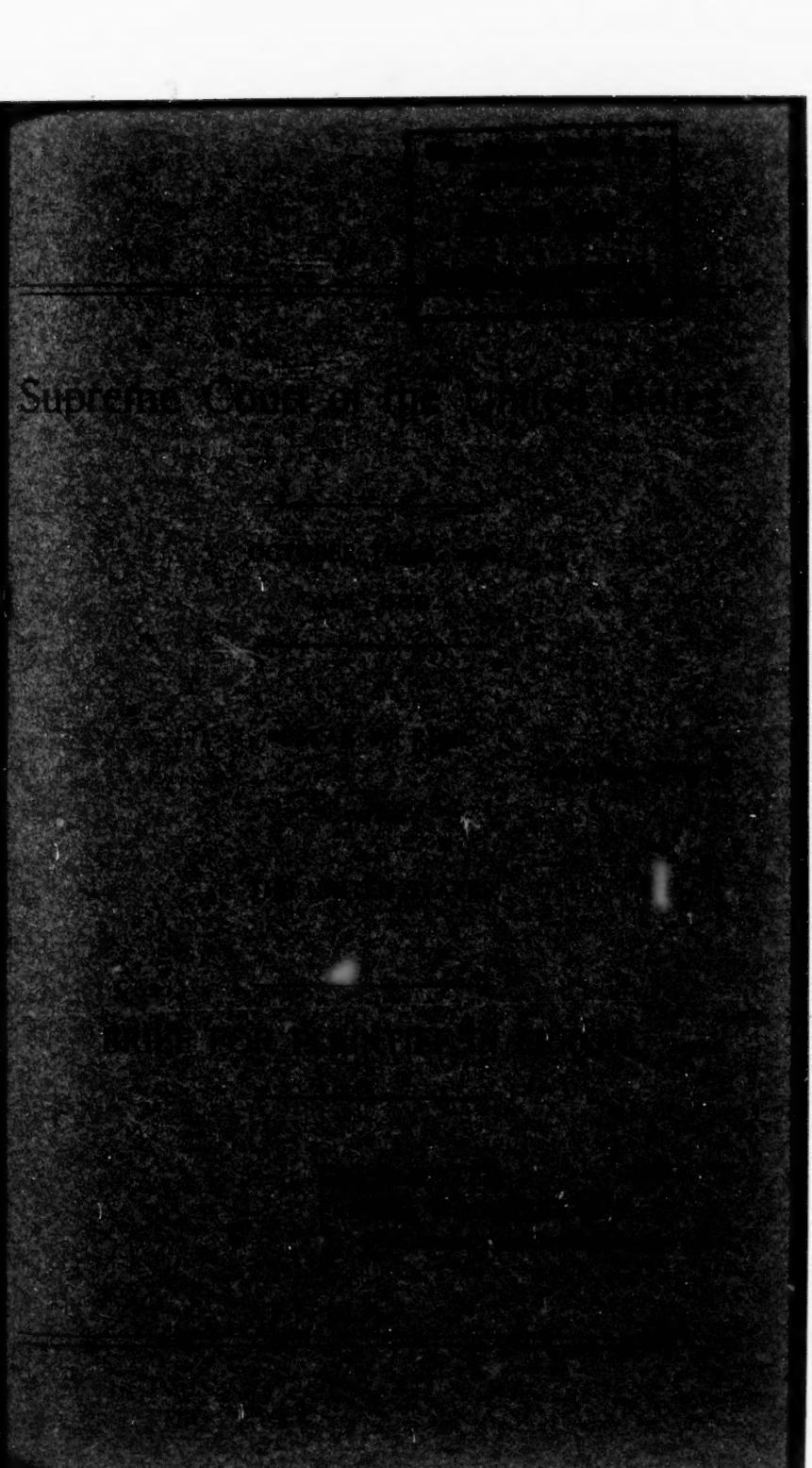

THE EVENING POST JOB PRINTING OFFICE, 156 FULTON ST., N. Y.

IN THE

Supreme Court of the United States.

OSCAR W. REID,
Plaintiff-in-Error,

VERSUS

THE UNITED STATES.

BRIEF IN BEHALF OF PLAINTIFF-IN-ERROR.

This case comes before this Court upon writ of error, directed to the District Court of the United States for the Southern District of New York, to review a judgment overruling a demurrer to a defense, the writ having been allowed September 1, 1908 (Transcript of Record, 1).

In January, 1908, plaintiff-in-error brought suit against the United States to recover $122.26, the amount due him as an enlisted man in the regular army, from November 16, 1906, the date of his wrongful discharge "without honor," to July 18, 1907, the date when his term of enlistment expired (Transcript of Record, pp. 3–9).

Act of March 3, 1887, c. 359; amended June 27, 1898, c. 503.

In April, 1908, the Government interposed an answer to the petition which contained three separate defenses, to the third of which plaintiff-in-

error interposed a demurrer (Transcript of Record, pp. 10–14, 36). The lower Court overruled the demurrer and directed judgment dismissing the petition on the merits (*Id.*, p. 41).

The third defense contains a recital of the circumstances which led to the issuance of the order for plaintiff-in-error's discharge, and of the alleged reasons which actuated the President in directing the issuance of the order. The demurrer, following the practice which prevails in the State of New York, is "on the ground that it" (the third defense) "is insufficient in law, upon the face thereof" (United States Revised Statutes, Sec. 914; New York Code of Civil Procedure, Sec. 494).

By demurring plaintiff-in-error admitted the facts alleged in the third defense and, as the defense set up new matter, the facts alleged in the petition must also be deemed to be true.

Cutler v. *Wright*, 22 N. Y., 472, 478.
Long v. *City of New York*, 81 N. Y., 425.
Douglass v. *P. I. Co.*, 138 N. Y., 209, 215.

But he did not admit any facts stated in the first and second defenses contained in the answer, nor any *conclusions* of law or fact contained in the third defense.

Dillon v. *Barnard*, 21 Wall., 430.
Masterson v. *Townshend*, 123 N. Y., 458, 461.
Talcott v. *City of Buffalo*, 125 N. Y., 280.
Davies v. *Penton*, 6 Barn & C., 216.

The writ of error, therefore, brings up for review the legality of the act of the President of the United States in ordering the discharge of the plaintiff-in-error, an enlisted man, from the army of the United States under the circumstances which will now be stated.

Statement of Facts.

Oscar W. Reid, the plaintiff-in-error, enlisted on July 18, 1904, in the Regular Army of the United States for a term of three years as a private in Company C in the Twenty-fifth Regiment of Infantry (Petition, paragraph II, Answer, Schedule A). This regiment is composed of colored men (Schedule B).

Transcript of Record, pp. 3, 15, 16.

In the night of August 13, 1906, a disturbance and breach of the peace occurred in Brownsville, Texas. At that time Companies B, C and D of the first battalion of the Twenty fifth Regiment were stationed at Brownsville. In the course of the disturbance a citizen of Brownsville was killed, another wounded and private property was damaged (Petition, paragraph V).

Transcript of Record, p. 3.

On August 15 certain citizens of Brownsville addressed a telegram to the President of the United States requesting him to have the troops at once removed from Fort Brown and replaced by white soldiers. The appeal was directed to the President "as Commander in Chief and as President of our whole people." In this telegram the Committee of Citizens stated that they had been appointed at a mass meeting of the people of Brownsville, held August 14, "to investigate the attack made on this City by negro troops now stationed at Fort Brown," and that after an almost continuous session of two days they had found as follows:

> "That at a *few minutes before midnight* on Monday, the 13th, a body of United States soldiers of the Twenty-fifth United States Infantry (colored) numbering between twenty and thirty men, emerged from the garrison enclosure, carrying their rifles and abundant supply of ammunition, and also began firing

> in town and directly into dwellings, offices, stores, and at police and citizens" (*Id.* pp. 12, 16).

Thereupon the President directed full report to be made to him upon the subject of the telegram.

On August 15, the Military Secretary advised the secretary to the President that he had received a telegram from Major Penrose, the commanding officer at Fort Brown, dated August 16.

Major Penrose stated that he *believed* the shooting was done by enlisted men of the post, but had not yet been able to detect guilty party; that he was conducting most thorough investigation possible, and working in perfect harmony with Citizens' Committee and Mayor of Brownsville; that conditions were well in hand by both Mayor and himself; and that no trouble had occurred since the shooting and none was anticipated (*Id.*, pp. 12, 18).

On August 18, 1906, Major Blocksom, Inspector-General, arrived at Brownsville, Texas, pursuant to orders, and began an investigation which continued until August 29, on which date he rendered a report, together with voluminous transcripts of evidence taken by him (*Id.*, pp. 13, 19).

After stating the nature and extent of his investigation and the alleged causes of the disturbance, Major Blocksom stated that he believed that the first shots were fired between the barracks and the wall separating the post from the town, and that a number were fired into the air for the purpose of creating an alarm; "the soldiers, nine to fifteen, possibly more then jumped the wall and started through the town. There is no reliable evidence to support the claim that the first shots came from the town, and no bullet mark were found on the barracks."

After stating the effects of the shots, Major Blocksom continued as follows:

> "*None of the individual raiders was recognized. Streets are poorly lighted, and it was a dark night.* Those who saw them were

busy trying to keep out of sight themselves. The soldiers were comparative strangers in town, having arrived only two weeks before. That the raiders were soldiers of the Twenty-fifth Infantry cannot be doubted. The evidence of many witnesses of all classes is conclusive. Shattered bullets, shells and clips found are merely corroborative. I do not think the commanding and other officers, and some of the senior noncommissioned officers can be blamed for not discovering the *preconcerted* raid. . . . . Who could imagine that American soldiers in a body would try to murder unoffending women and innocent children? . . . . *All the officers firmly believed* (most of them till morning) the garrison was attacked from the town side as a result of the assault on Mrs. Evans, the general ill feeling of the town people, &c. . . . . As a consequence, the raiders were not suspected by their officers and had an easy time getting back; while arm racks were opened with difficulty in the dark, preparations made for defense, &c., cleaning the rifle requires a few minutes only. . . . .

"The officers appeared to be trying to find the criminals, but it is certainly unfortunate, for the reputation of the battalion, that *they have as yet hardly discovered a single clue* to such a terrible preconcerted crime, committed by so many men. I believe the *battalion had an excellent reputation* up to the 13th of August, but the stain now upon it is the worst I have ever seen in the Army. *Many of its old soldiers who had nothing to do with the raid* must know something tangible as to identity of the *criminals*. If they do not disclose their knowledge, they should be made to suffer with others more guilty, as far as the law will permit. If satisfactory evidence concerning identity of the criminals does not come from members of the battalion before a certain date, to be fixed by the War Department, I recommend that all enlisted men of the three companies present on the night of August 13 be discharged the service and debarred from re enlistment in the Army, Navy or Marine Corps."

On August 28, charges and specifications were preferred against the petitioner by a battalion adjutant of the Twenty-sixth United States Infantry, charging him with conduct to the prejudice of good order and military discipline in violation of the sixty-second article of war, in that the petitioner without authority took his rifle from the barracks, and singly or in company with others, took part in a disturbance in the streets of Brownsville on August 13.

The petitioner was never tried before any court martial or other tribunal on these charges or otherwise, and was never given any opportunity to be heard in his own defense, but was placed in confinement at Fort Brown, Texas, on August 14, and kept there until August 25, 1906. Then he was transferred to Fort Sam Houston, where he was kept in confinement until dismissed the service (*Id.*, p. 4).

On September 6, an Assistant United States Attorney transmitted a report to the President of the investigation made by him, wherein he reported that he and the other officials were "*impressed* "*with the difficulty of identifying any of the cul-* "*prits,*" and that the chances were "that unless the "soldiers clean up their own quarters or turn "state's evidence, no conviction can ever be had of "the guilty who have caused the disturbance and "trouble."

On October 4, 1906, the Acting Inspector General having made an investigation on the subject pursuant to instructions, reported the petitioner as among the men present at Fort Brown on August 13, 1906. This report was in due course transmitted to the President.

On October 4, 1906, by direction of the President, the Acting Secretary of War ordered Inspector General E. A. Garlington, Inspector General of the United States Army, to "proceed to the places "named in the accompanying letter, and en- "deavor to secure information that will *lead* "*to the apprehension and punishment of the*

" *men* of the Twenty-fifth Infantry *believed*
" *to have participated* in the riotous dis-
" turbance which occurred in Brownsville, Texas,
" on the night of the 13th of August, 1906, resulting
" in the death of one and the wounding of another
" citizen of that City."

Id., p. 13.

The President authorized General Garlington " to
" make known to those concerned the orders given
" by him in this case, viz., *if the guilty parties can-*
" *not be discovered, the President approves the*
" *recommendation that the whole three companies*
" *implicated in this atrocious outrage should be*
" *dismissed*, and the men forever debarred from re-
" enlisting in the Army or Navy of the United
" States."

The President further authorized General Garlington " to make known to those concerned " that *unless enlisted men who had knowledge* of the facts relating to the shooting, killing and riotous conduct " on the part of the men with the organizations " serving at Fort Brown, Texas," report to the General such facts and all other circumstances within their knowledge which will assist in apprehending the guilty parties, " *orders will be* immediately " issued from the War Department *discharging every* " *man* in Companies B, C and D in the Twenty-fifth " Infantry *without honor*, and forever debarring " them from re-enlisting in the Army or Navy of " the United States, as well as from employment in " any civil capacity under the government " (*Id.*, pp. 13, 24).

General Garlington made the investigations directed, and on October 22, 1906, submitted his report to the President. This report is printed in full (*Id.*, pp. 13, 25).

In his report General Garlington stated that on the eve of his departure from Washington he had received papers " *informing me that the grand jury* " *in Brownsville, Texas, had failed to find true bills*

"*against these prisoners.*" He *examined each of the prisoners,* but found that

> "as soon as the subject of the trouble at Brownsville was introduced, the countenance of the individual being interviewed assumed a wooden, stolid look, and *each man positively denied any knowledge* of the circumstances connected with or individuals concerned in the affair. . . . . Each man admitted that these occurrences had been talked of and discussed within their hearing in the barracks of their respective companies, *but I could extract* no admission from any man that this discrimination and these acts of violence had caused any feeling of animosity on the part of the enlisted men of the Twenty-fifth Infantry against citizens of Brownsville. *When this attitude on the part of the enlisted men* under examination was developed, it became apparent that I could get no information from them that would assist me in locating the men actually guilty of the firing on the night of the 13th of August, 1906."

General Garlington discussed with the officers who were on duty with the battalion at Fort Brown on the night in question the means and methods employed by them to locate the guilty individuals, and "*found that absolutely nothing had been discovered;* "*that they had found no enlisted men who would ad-* "*mit any knowledge of the shooting or of any cir-* "*cumstances, immediate, or remote, connected with* "*the same.*"

Thereupon he called before him, individually, a number of enlisted men, non-commissioned officers and privates of long service in the Twenty fifth Infantry, ranging from twenty-six years to five or six. He

> "found the same mental attitude on their part; *could discover absolutely nothing that would throw any light on the affair,* and received *the same denial* that any feeling of animosity or spirit of revenge existed among the enlisted men of the Twenty fifth Infantry

> against the citizens of Brownsville on account of discrimination against them in the way of equal privileges in saloons or on account of the two acts of violence against their comrades."

He further said:

> "The secretive nature of the race, where crimes charged to men of their color are made, is well known. Under such circumstances self-protection or self-interest is the only lever by which the casket of their minds can be pried open."

Acting upon this principle General Garlington pointed out and enlarged upon the history and record of the regiment, the odium and disgrace to the battalion and to its individual members by the crime, the future effect upon the individuals and upon the battalion as a whole, and, finally, the concern of the President of the United States in the matter, "his desire and the desire of the War De- "partment to separate the innocent from the guilty "were explained; all without effect."

After giving the members of the battalion "an "opportunity to give such information as might be "within their power that would lead to the *detec-* "*tion of the few men guilty of the crime*," he read to them the orders of the President, and informed them that they would be given until nine o'clock the next day to consider the matter. Only one man presented himself, First Sergeant Mingo Sanders, a man with twenty-six years' service, who still disclaimed "any knowledge of the affair, and stat- "ing his inability to make any discovery connected "therewith."

The conclusion reached by General Garlington was that

> "orders be issued as soon as practicable discharging without honor every man in Companies B, C and D of the Twenty-fifth Infantry, serving at Fort Brown, Texas, on the

night of August 13, 1906, and forever debarring them from re-enlisting in the Army or Navy of the United States, as well as from employment in any civil capacity under the Government."

In making the recommendation, the General stated that he recognized the fact "*that a number* " *of men who have no direct knowledge as to the* " *identity of the men* of the Twenty-fifth Infantry " who actually fired the shots on the night of the " 13th of August, 1906, *will incur this extreme* " *penalty.*"

He stated that it *had been established by careful* investigation "*beyond reasonable doubt* that the " firing into the houses of citizens of Brownsville, " while the inhabitants thereof were pursuing their " peaceful vocation or sleeping, ... was " done by enlisted men of the Twenty-fifth In- " fantry belonging to the battalion stationed at " Fort Brown." He further stated that after due opportunity, the men had failed to tell all that it is "*reasonable to believe*" they knew concerning the shooting, and that they appeared " to " stand together in a determination to resist the de- " tection of the guilty; therefore, they should stand " together when *the penalty falls.*"

The petitioner was among the persons examined by General Garlington in the manner and with the result stated in his report (*Id.*, p. 13).

On November 5, 1906, the President issued an order directing that the recommendations of General Garlington be complied with (Answer, paragraph Twenty-first, Schedule G). Accordingly, on November 9, 1906, Special Order No. 266 was issued by the War Department, "*by direction of the President,*" *discharging* the men therein named, including the petitioner, *without honor*, from the army, and forever debarring them from re-enlisting in the army or navy of the United States, as well as from employment in any civil capacity under the Government (*Id.*, pp. 13, 30).

Thereafter, there was delivered to the petitioner a document which stated that he was discharged without honor from the army of the United States in consequence of the said Special Order No. 266 (*Id.*, pp. 6, 13, 30).

In the twenty-first, twenty-fourth and twenty-fifth paragraphs of the answer it is alleged that the President *believed* from his consideration of the investigations and reports that a number of the regiment had committed the "crimes under consideration," and that most of the regiment knew the identity of the guilty men; and, furthermore, that the President *believed or claimed* that the discharge was not made as a punishment of the petitioner or of others, but for the good of the service and for the maintenance of the *morale* of the army, and that the army should contain only such troops as the President in his judgment could absolutely rely upon and safely quarter under arms among the people of the United States, and further that the President *also believed* that in ordering the discharge without honor of the petitioner and the other soldiers without court-martial, he acted pursuant to precedents (*Id.*, pp. 13, 14).

The so-called precedents were collated *after* the men had been discharged. They are contained in Schedule J annexed to the answer (*Id.*, pp. 32, 34).

It is of interest, although not important, to note that on January 15, 1907, the President issued an order rescinding so much of Special Order No. 266 as debarred the discharged members of the regiment "from employment in any civil capacity under the Government" (*Id.*, p. 36).

Epitomized, the important features of the case are as follows:

The President threatened to discharge every man of the battalion without honor unless he would confess either that he was guilty, or that he knew and would tell who the guilty were, notwithstanding the denial by every man who was examined that he participated in the affray or knew who did so. No

one having come forward to admit guilt, or knowledge of the guilty, the President issued an order directing the discharge, without honor, of every enlisted man in the battalion at Brownsville, notwithstanding the conceded innocence of actual participation in the affair of the majority, and ignorance, in any event, of the identity of the guilty on the part of a number of the men. The petitioner was one of those discharged. He was also one of the twelve enlisted men arrested on a suspicion of guilt. He swears he was wholly innocent. The Grand Jury of the county, in which Fort Brown is situated, after an investigation extending over three weeks, failed to find any indictment against any enlisted man. Charges were preferred against the petitioner under the Articles of War, but were abandoned without his having been given an opportunity to be heard. All the Inspectors-General who reported to the President admitted that it was absolutely impossible to prove the identity of any one of the men alleged to have taken part in the affray. There were no court-martial proceedings; all the investigation was *ex parte*. The discharge was not made on the approval of any Board of Officers or Board of Inquiry, but upon the conclusion of the Inspector-General that some of the men, whose identity were unknown, were guilty, and that others, who must have known who the guilty were, refused to tell. It is evident upon the face of the reports that each investigator began his inquiry with the assumption that some of the battalion were guilty.

The petitioner respectfully submits that not a scintilla of evidence was produced tending in the slightest degree to connect him with the riotous disturbance. Suspicion is not proof. Surmise and hearsay and belief can never take the place of competent testimony. In any event, he was entitled to a trial by court-martial or other military tribunal, and could lawfully be discharged only upon adverse findings thereof.

The questions raised here go to the very founda-

tions upon which rest the more perfect Union, the establishment of justice, domestic tranquility and the blessings of liberty ordained and established by the Constitution of the United States.

> "I but repeat the language of the Supreme Court of the United States when I say that in this country the law is supreme. No man is so high as to be above the law. No officer of the Government may disregard it with impunity."
>
> *Miller on the Constitution*, p. 33.

> "Not only, therefore, the safety of the individual, but that of the nation itself, requires the utmost precaution in the establishment of that necessary but formidable prerogative of dispensing punishments. The first to be taken, even without which it is impossible to avoid the dangers above suggested, is, that it never be left at the disposal, nor, if it be possible, exposed to the influence, of the man who is the depository of the public power."
>
> *De Lolme on the English Constitution*, Chapter XII.

> "Can an American judge, without an abuse of judicial discretion, condemn any one, individual or corporation, who has not in his own person first been duly indicted, duly tried and duly convicted?"

Mutatis mutandis, this excerpt from the recent opinion of the Circuit Court of Appeals denying the Government's motion for a rehearing in the *Standard Oil* case, embodies the fundamental question at issue in the case at bar.

POINTS.

I.

The powers to raise, support and govern the army are vested in Congress (p. 23).

Constitution, Article I, Secs. 8, 10; Article II, Secs. 1, 2, 3; Fifth Amendment.

United States Compiled Statutes, 1901, pp. 814, 817.

Articles of War (U. S. Rev. St., Sec. 1342).

II.

The discharge of the petitioner was intended to be, and was, in fact, a punishment (p. 28).

III.

A discharge without honor is of doubtful legality (p. 30).

2 Winthrop on Military Law, 2d Ed., 848, 847.

Davis Military Law, 357.

O'Brien's American Military Law.

IV.

Assuming that the riotous disturbance was participated in by some member of the battalion, the punishment of the innocent was not thereby justified (p. 32).

V.

The President has no powers except such as are conferred upon him by the Constitution and the laws of Congress enacted thereunder (p. 34).

Kansas v. *Colorado*, 206 U. S., 46, 90.
McCulloch v. *Maryland*, 4 Wheat., 316.
Ex parte Merryman, Taney's Rep., 246.
The Floyd Acceptances, 7 Wall., 666.
U. S. v. *San Jacinto Tin Co.*, 125 U. S., 273.
3 *Elliott's Debates*, 58, 59.
Bryce's American Commonwealth.
Miller on the Constitution, 156.
The Federalist, Nos. 67, 69, 74.
De Lolme's British Constitution, Book I, Chap. VII.
1 *Kent's Commentaries*, 221, 282.
1 *Blackstone Commentaries*, 262, 408-421.
Kneedler v. *Lane*, 45 Pa., 238.
Story on the Constitution, Sec. 1197.
Dynes v. *Hoover*, 20 How., 65.

VI.

The President's act in discharging the petitioner without trial was in excess of his powers and in violation of the petitioner's rights (p. 42).

United States Compiled Statutes, 1901, page 973.
Articles of War.
United States Revised Statutes, Sec. 1342.
United States Compiled Statutes, 1901, page 868.

4 Opinions Attorney General, 1.
4 id., 603.
6 id., 4.
12 id., 421.
15 id., 421.
Blake v. *United States*, 103 U. S., 227.
Street v. *United States*, 133 U. S., 299.
Mullan v. *United States*, 140 U. S., 240.
Hartigan v. *United States*, 196 U. S., 169.
United States Revised Statutes, Sec. 1253.
United States v. *Kingsley*, 138 U. S., 87.
United States v. *Barnett*, 189 U. S., 474.

VII.

The contention that the President acted according to precedent cannot be maintained; the so-called precedents cited by the Military Secretary have no application whatsoever to the present case. They were "hunted up" after the order was issued (p. 51).

Thompson v. *Kentucky*, 209 U. S., 340, 346.
Rathbone v. *Wirth*, 150 N. Y., 459, 477.
Swaim v. *United States*, 28 Court of Claims, 173, 221.

VIII.

The President's belief that the good of the service and the maintenance of the morale of the army required that there should be in the army only such troops as he could absolutely rely upon and safely quarter under arms among

the people is not a justification in law for the discharge without trial of 167 enlisted men accused of serious crime (p. 53).

Ex parte Milligan, 4 Wallace, 2.

IX.

The President's act in ordering the discharge of the petitioner without trial is tantamount to nullification of the provision of the Constitution which gives Congress the power to raise and support armies. Arbitrary action by any branch of the Government is not favored in American jurisprudence (p. 56).

Constitution of Kentucky.
Constitution of Wyoming.
Standard Oil Co. v. United States, MS.
United States v. Delaware & Hudson Co., MS.
Ex parte Merryman, Taney's Reports, 246.
Dicey's Law and Opinion in England, 174, 215.

X.

The petitioner upon enlistment acquired the right to serve out his term of enlistment unless legally discharged and the right not to be punished except for violations of the Articles of War after court-martial (p. 61).

Slaughterhouse Cases, 16 Wallace, 32, 116, 122.
United States Revised Statutes, sec. 1118.
In re Grimley, 137 U. S., 147.
Articles of War.

XI.

Enlistment in the army of the United States did not deprive the petitioner of his rights as a citizen (p. 62).

O'Brien's American Military Law, 27, 28, 30, 175.
Dicey's Introduction to the Study of the Law of the Constitution, 6th edition, pp. 295, 301.
Ex parte Merryman, Taney's Reports, 246.
Ex parte Milligan, 4 Wallace, 2.
United States v. *Clark*, 31 Federal Reports, 710.
Dicey's Law of the Constitution, 305.
Mutiny Act, 1 William & Mary, C 5 of 1689.
The Federalist, Nos. 25, 84.
Cooley's Constitutional Limitations, 7th edition, 500, 504.
Norman v. *Heist*, 5 W. & S., 171, 173.
Swaim v. *United States*, 28 Court of Claims at page 221.

XII.

No citizen of the United States can be deprived of liberty or property without due process of law (p. 70).

Dartmouth College Case, 4 Wheaton, 518, 581.
Hurtado v. *California*, 110 U. S., 516.
Holden v. *Hardy*, 169 U. S., 366.
St. Louis R. Co. v. *Davis*, 132 Fed. Rep., 633.
Simon v. *Craft*, 182 U. S., 427.
Wilson v. *Standefer*, 184 U. S., 399.

Chicago, etc., R. Co. v. *Chicago*, 166 U. S., 226.
McGehee, Due Process of Law, 49, 60, 73, 76.
Matter of Jacobs, 98 N. Y., 98, 106.
Allgeyer v. *Louisiana*, 165 U. S., 578.
Hovey v. *Elliott*, 167 U. S., 409.
Guthrie, 14th Amendment, 67.
Davidson v. *New Orleans*, 96 U. S., 97.
Stuart v. *Palmer*, 74 N. Y., 183.
United States Compiled Statutes, 1901, pp. 814, 801, 855, 912, 913.
United States Revised Statutes, Secs. 1293, 1305–1308.
Pollock's Essays in Jurisprudence, 212–221.
1 Holdsworth History of English Law, 277.

XIII.

Article 4 of the Articles of War did not authorize the discharge of the petitioner (p. 73).

Penal Code of Texas, Article 698.
Bartemyer v. *Iowa*, 18 Wallace, 129.
Ex parte Virginia, 100 U. S., 339, 347.

XIV.

If the maintenance of discipline or other necessities of the army require that discretion to discharge without trial be given to the Commander-in-Chief or other officers, it is a matter for legislation and such discretion cannot be established by precedent and should not be sanctioned by judicial legislation (p. 79).

Act of February 2, 1901, 31 Stat., 748.
United States Revised Statutes, Secs. 1105, 1158, 1342.

Act of June 16, 1890, 26 Stat., 157.
Act of October 1, 1890, 26 Stat., 562.
Act of February 27, 1890, 26 Stat., 13.
Act of February 16 1897, 29 Stat., 530.
Act of May 17, 1886, 24 Stat., 50.
Act of February 26, 1901, 31 Stat., 810.
Act of March 1, 1875, 18 Stat., 337.
Smith v. *United States*, 38 Court of Claims, 257, 273.
McBlair v. *United States*, 19 Court of Claims, 528, 541.

XV.

An enlisted man is not an officer of the Government within the meaning of the Act of March 3, 1887, as amended by the Act of June 27, 1898 (p. 84).

United States Revised Statutes, Sec. 1094, superseded by Act of February 2, 1901; 1104; 1108; 1261; 1280.
In re Grimley, 137 U. S., 147.
United States v. *Smith*, 124 U. S., 525, 532.
United States v. *Mouat*, 124 U. S., 303.
United States v. *Germaine*, 99 U. S., 508.
United States Compiled Statutes, 1901, pp. 753, 549, sec. 707.
United States v. *McCrory*, 91 Fed. Rep., 295.
United States v. *March*, 92 Fed. Rep., 689.
Strong v. *United States*, 93 Fed. Rep., 257.
McGregor v. *United States*, 134 Fed. Rep., 187.
United States v. *Maurice*, 2 Brock, 96.

Mechem's Public Offices & Officers, Sec. 6.
Articles of War, Article 2.
United States Revised Statutes, Sec. 1757.

XVI.

The judgment should be reversed and the case remanded, with instructions to sustain the demurrer (p. 89).

Ex parte Lange, 18 Wallace, 163, 178.

Preliminary.

Our effort under these several points will be to reach the intention of the Constitution and of Congress. Our conclusion will be that by neither of these authorities was it intended to confer upon the President the arbitrary power which he exercised in the present case.

In the Court below the learned United States Attorney misapprehended the petitioner's contention. We do not contend that enlistment constitutes an irrevocable contract, or that the *Government* cannot dismiss enlisted men before the expiration of their terms of enlistment. Our contention is that Congress has provided the way in which enlisted men *must* be found guilty, if in fact guilty, of offenses against good order and military discipline, and that this mode is exclusive. We do not concede that the *Government* consists of only one branch.

We are not concerned upon this argument whether or not the petitioner participated in or knew whether any members of the dismissed battalion did participate in the Brownsville affray. We believe he was innocent, but that is our individual belief and cannot be permitted to play any part in the argument. Our purpose is not to shield those guilty of participation

in the disorder. All that we are concerned with here is to secure for the petitioner the right to a trial by proper military tribunal upon charges properly preferred before receiving his discharge, if he is to be discharged.

In the brief below the Government said:

> "Everything has been done to prevent there being the slightest danger of regarding a soldier's position as one of caste or privilege."

We are not seeking to set up any caste or privilege for any class of citizens, whether in or out of the army. Our protest is indeed against the President's making the private soldier a member of a caste by saying that he belongs to a class which is not entitled to the right of trial and may be treated by the Executive as the Executive sees fit. The contention of the Government in this case, if sustained, would result in establishing the proposition that the private soldier is not entitled to privileges to which every other American citizen is entitled, namely, to be heard in his own defense upon charges properly preferred before conviction.

What we are seeking to maintain here is the preservation of the clearly defined constitutional distinction between the Executive and the legislative branches of the Government. In effect, the petition here is a protest against Executive encroachment. There is a tendency observable not only in the National Government, but in State governments as well, on the part of the Executive, to encroach upon the legislative and indeed the judicial branches.

> See "Executive Aggression," in *Atlantic Monthly*, Vol. 102, No 5, p. 577, November, 1908.

Decisions by the courts which are not approved of by the Executive are termed "miscarriages of justice." The President is said to have Congress on his hands and that Executive is sought either in the

Nation or in the States who can compel the Legislature to do his will. We are seeking to restore the balance created by the Constitution between the two equal and co-ordinate branches of the Government. If the President can arrogate to himself the right to discharge enlisted men singly or in battalions without trial and merely because he thinks they are not fit to remain in the army, what becomes of the constitutional right of Congress to make rules for the government and regulation of the land and naval forces?

Below the Government said:

> "The issue is this: Has the President of the United States power to dismiss summarily a private in the regular army before the expiration of the three years' enlistment?"

That is not the issue. It is merely an incidental question. Even so, it is not stated fairly. Nowhere have we disputed the right of the President to dismiss an enlisted man in the manner prescribed by Congress. The issue is, Shall Executive order take the place of the rule of Congress which prescribes trial by court-martial for military offenses?

This Court has ever upheld the distinction between the three great branches of the Government. We need refer only to the case of *Kilbourn* v. *Thompson*, 103 U. S., 168, and to No. XLVIII. of the *Federalist*.

ARGUMENT.

I.

The powers to raise, support and govern the army are vested in Congress.

The Constitution of the United States grants to the Federal Government the right to maintain an

army, and places the entire matter under the control of Congress.

Article I., Section 8, provides:

> "The Congress shall have power. . . . .—
> To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water;
> To raise and support armies, but no appropriation of money to that use shall be for a longer term than two years;
> To provide and maintain a navy;
> To make rules for the government and regulation of the land and naval forces;
> To provide for calling forth the militia to execute the laws of the Union, suppress insurrections and to repel invasions;
> To provide for organizing, arming and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the States respectively the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress. . . . .
> To exercise . . . . like authority [exclusive legislation over all places purchased by the consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards and other needful buildings."

Under the section of the Constitution which contains the limitations on the powers of the States further power is given to Congress:

Article I., Section 10:

> " . . . . No state shall, without
> " the consent of Congress, lay any duties of
> " tonnage, keep troops, or ships of war, in
> " time of peace, enter into any agreement or
> " compact with another state, or with a
> " foreign power, or engage in war, unless
> " actually invaded, or in such imminent
> " danger as will not admit of delay."

The powers of the President respecting the army are the following:

Article II., Section 1:

> " The executive power shall be vested in a " President of the United States of America " . . . . he shall take the following " oath or affirmation: 'I do solemnly " swear (or affirm) that I will faithfully ex- " ecute the office of President of the United " States, and will to the best of my ability, " preserve, protect and defend the Constitu- " tion of the United States.' "

Section 2:

> " The President shall be commander in " chief of the army . . . . of the " United States; . . . .
> " He shall nominate . . . . all other " officers of the United States . . . . " which shall be established by law . . . ."

Section 3:

> " He shall . . . . take care that the " laws be faithfully executed, and shall com- " mission all the officers of the United " States."

The Fifth Amendment is a limitation alike upon Congress and the President:

> " No person shall be held to answer for a " capital, or otherwise infamous crime, unless " on a presentment or indictment of a grand " jury, except in cases arising in the land or " naval forces, or in the militia, when in " actual service in time of war or public " danger; nor shall any person be subject " for the same offence to be twice put in " jeopardy of life or limb; nor shall be com- " pelled in any criminal case to be a witness " against himself, nor be deprived of life, " liberty, or property, without due process " of law; nor shall private property be taken " for public use, without just compensation."

It thus appears that Congress has power to *raise* and support armies, and to make *rules* for the government and regulation of the land forces. The President has power to appoint and commission officers, to execute the laws, and is commander-in-chief.

An army can be *raised* only by procuring members thereof; therefore Congress has exclusive power over enlistment. The right to *raise* and *support* includes the right to maintain an army. An army can be maintained only by keeping members in it. It therefore follows that Congress has exclusive control of keeping enlisted men in the army. Otherwise its power to maintain an army could be defeated by releasing or discharging all the members of the army taken in pursuant to the direction of Congress.

Congress has absolute power over enlistment and discharge. The President cannot increase or deminish the army by enlistment or discharge, unless authorized or permitted to do so by Congress.

The entire field of enlistment has been covered by Congress, and no enlistment can be made except under some statute.

Congress has dealt exhaustively with the question of discharge.

It has provided for discharges upon the expiration of enlistment by prescribing the terms thereof.

U. S. Comp. St., 1901, p. 814.

Voluntary discharges by purchase are permitted, in the discretion of the President, where there is a dependent parent.

U. S. Comp. St., 1901, p. 817.

Discharges as punishment for offenses are specifically authorized.

Articles of War.

Thus the only three ways of terminating the relationship of enlistment have been dealt with by Congress:

1. Expiration of term.

2. Consent of both parties to the contract.

3. Breach of contract.

It is a familiar rule of law that the exercise of a power by statute is presumed to be exhaustive, so that when Congress has acted it is presumed to have covered the entire field.

We might at this point contend that no discharge, except pursuant to some specific statute, is valid, but it is unnecessary to go so far in the present case.

No case has been found upholding the validity of a discharge not granted under some specific statute, and the validity of discharges such as those mentioned in Schedule J has never been considered by any court.

Congress has fully covered the ground of offenses by enlisted men and punishment therefor.

Articles of War.

No offense embraced within these sections can be punished except as provided by Congress.

The provisions for the maintenance of discipline are rules for the government and regulation of the land forces. No rules or regulations can be more important than those which tend to increase the efficiency of the army, and discipline is the most important element in efficiency.

Congress has exercised its powers to make rules and regulations for the maintenance of discipline by defining in general detail the duties of enlisted men:

By defining offenses:

By prescribing punishment for offenders:

Articles of War.

These provisions relating to the maintenance of discipline are so exhaustive that it might well be argued that no other means can be employed for the purpose of maintaining discipline. It is unnecessary, however, to go beyond contending that where the statutes provide a means for maintaining discipline under given circumstances, no other means can be used.

Inclusio unius est exclusio alterius.

II.

The discharge of the petitioner was intended to be and was in fact a punishment.

The assertion is made in the twenty-fourth paragraph of the answer that the discharge of the petitioner was "*made not as punishment,*" but for the good of the service and for the maintenance of the *morale* of the army. But compare the President's instructions to General Garlington (*Transcript of Record*, p. 24).

It is not contended even by the Government that the discharge was not *in fact* a punishment. The allegations that it was *made not* as punishment, relates to the intention of the President and does not alter the *fact* that it was a punishment.

General Garlington, upon whose recommendation and report the President acted, says:

> "In making this recommendation, I recognize the fact that a number of men who have no direct knowledge as to the identity of the men of the Twenty-fifth Infantry who actually fired the shots on the night of the 13th of August, 1906, *will incur this extreme penalty*" (*Transcript of Record*, p. 29).

The petitioner and his comrades were accused by the President in messages to Congress as having

been guilty of "horrible atrocity," "a deliberate and concerted attack, as cold-blooded as it was cowardly," "a successful conspiracy of silence." "The crime they committed or connived at was murder." "The most deadly violation of the law." "A black and dastardly crime" (59th Congress, 2d Session, Senate Document No. 155).

In the record here these expressions are used:

"The *attack* made on the city by negro troops." "American soldiers in a body would try to *murder* unoffending women and innocent children." "A *terrible preconcerted crime*, committed by so many men." "Midnight *assassins* or riotous disturbers of the peace." "Committing the *crime* of firing into the houses and upon the citizens of Brownsville" (*Transcript of Record*, pp. 16, 22, 29, 30).

The frequent use of these epithets, the language of the Executive instructions, and the repeated use of the word "penalty" in General Garlington's report, demonstrate the inaccuracy of the conclusion of fact in the Twenty-fourth paragraph of the answer. Reflection during the many months that have elapsed since the punishment was inflicted may now induce the belief that it would have been wiser and more prudent if a different course had been pursued. But the indelible words of the Record show most clearly that in November, 1906, the President intended to punish men who would not be frightened by the threatened infliction of an "extreme penalty" into admitting guilt and guilty knowledge, although they declared that neither existed.

III.

A discharge without honor is of doubtful legality.

Winthrop says that the legality of a discharge without honor is doubtful, and the distinction between it and dishonorable discharge is fanciful.

> 2 *Winthrop on Military Law*, 2d Ed., p. 848.

Could he have foreseen the Brownsville incident would he not rather have said that the distinction between it and dishonorable discharge is fantastic? How rarely discharge without honor has been availed of appears not only from the very superficial way in which it is considered by military writers of authority, but also from the memoranda, dated respectively December 5 and December 10, 1906, submitted by the Military Secretary to the Secretary of War.

> 2 *Winthrop Military Law*, 2d Ed., 847.
> *Davis Military Law*, 357.
> *O'Brien's American Military Law.*

Winthrop, at the page above referred to, says:

> "Strictly—it may be remarked—these commanders cannot, in the exercise of such authority, legally be restrained by their superiors. In practice, however, it is commonly from the War Department that discharges have been ordered under this Article (Fourth Article of War), and the principal grounds and occasion for the same have been—the termination of a state of war or hostilities rendering certain troops no longer necessary; inefficiency, unfaithfulness, sickness or disability on the part of an individual soldier; and minority."

It will be observed that the Military Secretary states that a protracted examination of the official

records resulted in failure to discover a precedent in the regular army for the discharge of the three companies (*Transcript of Record*, p. 32).

In the volunteer service *during the Civil War*, however, there occurred numerous instances of summary discharge because of misconduct on the part of enlisted men. The instances cited are of a company which refused to serve in Virginia; of another which refused to leave a certain section of the State; of a regiment which was in a state closely bordering on mutiny; of four companies which were mutinous and disaffected; of another company which refused to be consolidated with another organization; of another company which refused to do duty as infantry, claiming that they enlisted in the cavalry branch; of a regiment which was generally demoralized and from which there had been numerous desertions, and which was mustered out of service *at the request* of its officers and enlisted men; and, lastly, of a regiment which was disorganized, mutinous and worthless. But each of these cases occurred *during a time of war*, so that, if the apparently conceded fault and misconduct did not of itself furnish a proper reason for summary discharge, the overpowering necessities of war did.

In the second memorandum the Military Secretary states that he could find no record of the summary discharge from the regular army prior to the discharge of the negro battalion of a considerable number of enlisted men at one time, but cases of the discharge of individual enlisted men without honor and without trial by court martial were not infrequent. During the year ending June, 1906, there were 352 of such discharges; but what were t[illegible] causes? 86 on account of *fraudulent enlistment;* 1[illegible] on account of *desertion;* 8 on account of *desertion and fraudulent enlistment;* 107 on account of *imprisonment under sentence of civil court;* and 38 on account of having become *disqualified for service through their own misconduct.* Fraud vitiates every contract. Humane considerations may have en-

tered into the discharge of the 113 discharged on account of desertion. The 107 discharged on account of imprisonment under sentence of civil court had been found guilty after trial in a proper tribunal. The 38 discharged on account of disqualification for service through misconduct apparently never complained, so whether they were justly discharged or not cannot now be settled. They acquiesced in the discharge, so far as we know. Their case is irrelevant, because here the petitioner complains of and does not acquiesce in his discharge without honor without trial.

The validity of none of these discharges, or any similar discharges, has ever been tested in any court of law.

Here we have the case of a soldier—indeed, a whole battalion—accused of a serious criminal offense. The civil law, acting through the Grand Jury, failed to find a true bill. If the civil law, concededly superior to the military law, could find no grounds for proceeding against these men, is it not farcical to claim that an Executive order can convict them, without trial, of a crime charged but not proved against them?

IV.

Assuming that the riotous disturbance was participated in by some member of the battalion, the punishment of the innocent was not thereby justified.

The committee of Brownsville citizens alleged in their message to the President that the number of the soldiers who took part in the firing was between twenty and thirty. Major Blocksom estimated that the number was "9 to 15, possibly more."

General Garlington reported that he recognized the fact that a number of men who had no direct

knowledge as to the identity of the guilty "will incur this extreme penalty."

The whole number of men included in the order of November 9th, issued by the War Department by direction of the President, is 167.

It may be claimed that of the 158 to 137 men who were not even suspected of having actively participated in the raid, some must have known who the participants were. This assumes that from nine to thirty soldiers actually did take part in the raid, and that all the others, in spite of the excellent character which they bore, deliberately lied when they denied any knowledge whatsoever of the affair.

We have shown that there is not a word in the reports which in any way implicates the petitioner or connects him with the raid, unless the fact be assumed that some one or more of the soldiers were guilty of the firing, and that he knew who they were. But it is conceded that some of the men who were discharged knew nothing whatever about the raid (*Transcript of Record*, pp. 22, 29). It is hardly likely that if from nine to thirty did participate in the affair, they would be willing to let all of their comrades know of their participation lest some one or more would tell sooner or later. The probabilities, based upon human experience, permit of no other conclusion. Men who commit crime are cautious about letting others into their confidence. Interest, spite, envy and the dozen and one considerations that prompt men to seek advantage, are quite as likely to be found among the members of a battalion as in the ordinary walks of life.

Justice is designed to protect the innocent quite as much as to punish the guilty. Was it just to punish those who were merely suspected of guilt or guilty knowledge? Was it just to punish the concededly innocent? Was it lawful to deny to the 167 men, including the petitioner, the presumption of innocence which is the very sign-manual of our system of administering justice?

V.

The President has no powers except such as are conferred upon him by the Constitution and the laws of Congress duly enacted thereunder.

The doctrine of inherent power in the Federal Government, or any branch thereof, was recently considered in the case of *Kansas* v. *Colorado*, 206 U. S., 46, 90. It is established that the Government of the United States, in all its parts, is one of delegated powers and that it has no others than those enumerated in the Constitution, or such as are necessarily to be implied or which follow therefrom.

McCulloch v. *Maryland*, 4 Wheat., 316, 405.

Ex parte Merryman, Taney's Rep., 246.

Below the Government argued that as the commander-in-chief of the English army had certain powers, and as our Articles of War were based upon the English Mutiny Act, the powers of the President and the scope of the articles are to be considered in the light of these historical precedents. This reasoning does not seem to be justified. In this country the Constitution has separated the command of the army from the power to raise, support and regulate the army. In England there is no such clear separation. The danger of quoting English precedents in cases of constitutional construction was pointed out by Mr. Justice Holmes when he said:

> "The English decisions throw no light upon the question before us because they are concerned only with the construction of statutes which, however construed, are law."
>
> *Chanler* v. *Kelsey*, 205 U. S., 466, 482.

In the case of *The Floyd Acceptances*, 7 Wall., 666, 676, the Supreme Court, by Mr. Justice Miller,

in speaking of the powers of an officer of the Government—in that case of the Secretary of War—said:

> "When this inquiry arises, where are we to look for the authority of the officer.
>
> The answer, which at once suggests itself to one familiar with the structure of our government, in which all power is delegated, and is defined by law, constitutional or statutory, is, that to one or both of these sources we must resort in every instance. We have no officers in this government, from the President down to the most subordinate agent, who does not hold office under the law, with prescribed duties and limited authority."

Mr. Justice Field in his concurring opinion in *U. S. v. San Jacinto Tin Co.*, 125 U. S., 273, 307, said:

> "I do not recognize the doctrine that the Attorney-General takes any power by virtue of his office except what the Constitution and the laws confer. The powers of the executive officers of England are not vested in the executive officers of the United States government, simply because they are called by similar names. It is the theory, and I may add, the glory of our institutions, that they are founded upon law, that no one can exercise any authority over the rights and interests of others except pursuant to and in the manner authorized by law."

It is not necessary at this date—nearly one hundred and twenty years after the adoption of the Constitution—to discuss the nature of the Government then established. Nor is it necessary to rehearse the circumstances which led to the foundation of the "more perfect Union" then ordained and established. The jealousy of the States, the fear least a dictator or king should arise to trample upon the liberties so recently won from the British Crown, led to the creation of a delegated, central authority to act for all collectively in matters which could not conveniently

be regulated by the several States acting separately. The powers of Congress, which makes; of the Executive, which executes; and of the Judiciary, which interprets, the laws, were carefully defined. In the Constitution, or in the amendments immediately adopted, the rights of the several States and of the individual citizens were most carefully guarded. The wise men who composed the convention debated earnestly and long upon the wisdom and expediency of creating a chief magistrate. The fear was expressed that he would become a king and would duplicate the oppressions of George III, from which relief had been so dearly purchased.

And see *3 Elliott Debates*, 58, 59.

A profound commentator upon our form of Government has said:

> "In the American system there exists no such body" (as parliament). "Not merely Congress alone, but also Congress and the President conjoined, are subject to the Constitution, and cannot move a step outside the circle which the Constitution has drawn around them. If they do, they transgress the law and exceed their powers. Such acts as they may do in excess of their powers are void, and may be, indeed ought to be, treated as void by the meanest citizen. The only power which is ultimately sovereign, as the British Parliament is always and directly sovereign, is the people of the States, acting in the manner prescribed by the Constitution, and capable in that manner of passing any law whatever in the form of a constitutional amendment."
>
> *Bryce's American Commonwealth*, Part I, Chap. IV, p. 33.

In the course of his lectures upon the Constitution before the students of the National University in 1889-90, the late Mr. Justice MILLER said:

> "A critical examination of the powers thus conferred on the President would hardly jus-

> tify the jealousy and dread which many of the wisest statesmen of the period of the formation of the Constitution entertained on that subject. With the exception that he shall be commander-in-chief of the army and navy, and of the militia of the several States when called into the actual service of the United States, and the power of appointment to office, there is little to justify such fear; and when we consider that Congress alone can declare war, and thus put the commander-in-chief in a position for any dangerous use of the military arm of the Government, that the co-operation of the Senate is necessary to the appointment of all the other officers of the army and navy below the President, . . . there would seem to be but little reason to dread an undue exercise of the grant of power to the President, under this provision of the Constitution."
>
> *Miller on the Constitution*, p. 156.

Alexander Hamilton devoted No. LXVII of *The Federalist* to a refutation of the fears which prevailed at the time the Constitution was in course of adoption, lest the President should become a despot. He said:

> "Here the writers against the Constitution seem to have taken pains to signalize their talent of misrepresentation. Calculating upon the aversion of the people to monarchy, they have endeavored to enlist all their jealousies and apprehensions in opposition to the intended President of the United States; not merely as the embryo, but as the full grown progeny, of that detested parent. To establish the pretended affinity, they have not scrupled to draw resources even from the regions of fiction. The authorities of a magistrate, in a few instances greater, in some instances less, than those of a governor of New York have been magnified into more than royal prerogatives. He has been decorated with attributes superior in dignity and splendor to those of a king of Great Britain."

In No. LXIX of *The Federalist*, he said:

> "Secondly. The President is to be Commander-in-Chief of the Army and Navy of the United States. In this respect his authority would be nominally the same with that of the king of Great Britain, but in substance much inferior to it. It would amount to nothing more than the supreme command and direction of the military and naval forces, as first General and Admiral of the Confederacy; while that of the British king extends to the *declaring* of war and to the *raising* and *regulating* of fleets and armies,—all which, by the Constitution under consideration, would appertain to the Legislature."

And again in No. LXXIV, speaking more broadly of the powers with which we are here immediately concerned, he said:

> "The President of the United States is to be 'commander-in-chief of the army and navy of the United States, and of the militia of the several states *when called into the actual service* of the United States.' The propriety of this provision is so evident in itself, and it is, at the same time, so consonant to the precedents of the State constitutions in general, that little need be said to explain or enforce it. . . . . Of all the cares or concerns of government, the direction of war most peculiarly demands those qualities which distinguish the exercise of power by a single hand. The direction of war implies the direction of the common strength; and the power of directing and employing the common strength, forms a usual and essential part in the definition of the executive authority."

It is at least questionable whether the British King, between whom and the President the opponents to the adoption of the Constitution attempted to draw a close analogy, has unlimited power over the army and navy. De Lolme, whose commentaries on the Constitution of England occupy the

same high place as do those of Mr. Bryce on the Constitution of our own country, said (Book I., Chap. VIII.):

> "The king has the military power; but still, with respect to this, he is not absolute. It is true, in regard to the sea-forces, as there is in them this very great advantage, that they cannot be turned against the liberty of the nation: at the same time that they are the surest bulwark of the Island, the king may keep them as he thinks proper; and in this respect he lies only under the general restraint of applying to parliament for obtaining the means of doing it. But, in regard to land-forces, as they may become an immediate weapon in the hands of power for throwing down all the barriers of public liberty, the king cannot raise them without the consent of parliament. The guards of Charles the Second were declared anti-constitutional; and James's army was one of the causes of his being dethroned."

And again in the same chapter he says:

> "Besides, the funds for the payment of these troops are to be paid by taxes that are not established for more than one year: and it becomes likewise necessary, at the end of this term, again to establish them."

In a note to this sentence, he says:

> "It is also necessary that the parliament, when it renews the act against mutiny, should authorize the different courts martial to punish military offences and desertion. It can therefore refuse the king even the necessary power of military discipline."
>
> *See Lowell on Government of England* (1908), Vol. I, pp. 22, 23.

Would any one contend that the President has the powers over the army so graphically portrayed by Bagehot, as quoted by Professor Lowell?

Chancellor KENT devotes only a short paragraph

to the subject of the President's powers as commander-in-chief:

> " He is commander-in-chief of the army and navy of the United States, and of the militia of the several states, when called into the service of the Union. The command and application of the public force to execute law, maintain peace, and resist foreign invasion, are powers so obviously of an executive nature, and require the exercise of qualities so characteristic of this department, that they have always been exclusively appropriated to it, in every well-organized government upon earth."
>
> 1 *Kent's Commentaries*, 282.

Now, the Constitution prescribes that the President shall be Commander-in-Chief of the Army and Navy of the United States (Art. II., Sec. 2). But it also prescribes that Congress shall have power to raise and support armies, and to make rules for the government and regulation of the land and naval forces (Art. I., Sec. 8). These two provisions imply clearly that the President has only the power of *directing* and *applying* the military forces which may be raised by the Congress. He can direct and apply them only in accordance with or subject to the rules and regulations made by Congress for their *government.*

The framers of the Constitution wisely divided authority over the military forces, giving to Congress the exclusive right to make laws for their *regulation and government*, and to the President their *direction or command* in accordance with those laws:

> "The power of making laws is the supreme power in a state, and the depa.tment in which it resides will naturally have such a preponderance in the political system, and act with such mighty force upon the public mind, that the line of separation between that and the other branches of the government ought to be marked very distinctly and with the most careful precision."

> "The Constitution of the United States has effected this purpose with great felicity of execution, and in a way well calculated to preserve the equal balance of the government and the harmony of its operations. It has not only made a general delegation of the legislative power to one branch of the government of the executive to another, and of the judicial to the third, but it has specially defined the general powers and duties of each of those departments. This is essential to peace and safety in any government, and especially in one clothed only with specific powers for national purposes, and erected in the midst of numerous state governments retaining the exclusive control of their local concerns."
>
> 1 *Kent's Commentaries*, 221.

Blackstone informs us that the king had sole supreme command and control of the army. Parliament was impotent in the matter of the government or direction of the military forces, but could exert a powerful check upon the activities of the king by withholding the supplies. This might check tyranny over the people by the king with the assistance of the army, but could have no effect upon the arbitrary power of the king to govern and regulate the army itself.

1 *Blackstone Com.*, 262, 408-421.

And see

Kneedler v. *Lane*, 45 Pa., 238.

The makers of our Constitution refused to follow the English model in this respect. While they made the President the Commander-in-Chief, they conferred upon Congress the power to make rules for the government and regulation of the armed forces.

Commenting upon and approving this division of power, Mr. Justice STORY says:

> "The whole power is far more safe in the hands of Congress than of the executive; since, otherwise, the most summary and se-

vere punishments might be inflicted at the mere will of the executive."

Story's Commentaries on the Constitution, Sec. 1197.

Did this distinguished jurist believe it to be possible that the Executive would ever claim it as his right to punish, by summarily discharging without honor, one hundred and sixty-seven enlisted men on mere suspicion of guilt? It matters not whether there was or was not good ground for suspicion. In spite of the allegations of the twenty-fourth paragraph of the answer, it is too clear for argument that a severe punishment has been inflicted upon these negro soldiers "at the mere will of the executive." It is equally clear that it has been done under a total misapprehension by the President of his power as Commander-in-Chief.

See *Dynes* v. *Hoover*, 20 How., 65.

VI.

The President's act in discharging the petitioner without trial was in excess of his powers and in violation of the petitioner's rights.

In the Government's defense, reliance is placed upon the words, "except by order of the President, the Secretary of War," etc., in the Fourth Article of War; and upon the wording of Sections 138 and 148 of Article XXI. of the Army Regulations, to justify the President's act in summarily discharging the petitioner and the other members of the three battalions "without honor."

The Army Regulations prescribed by the President have undoubtedly the force of law, in so far as they are consistent with the Constitution and the Articles of War enacted by Congress for the regula-

tion and government of the army (*U. S. Comp. St.*, 1901, p. 973). Without this sanction, they are waste paper and have no force whatever. We must, therefore, look to see whether the precise rules of the Articles of War are or are not consistent with the President's action.

These articles, 128 in number, are comprised in Section 1342 of the Revised Statutes of the United States. In enacting them, Congress prescribed that "the armies of the United States shall be *governed* by the following *rules* and articles."

A distinction is sharply made in the very opening paragraph of the section between *officers* and *enlisted men*. Article 4 prescribes that no enlisted men shall be discharged from the service without a discharge in writing, properly signed, nor shall any discharge be given to an enlisted man before the expiration of his term of service "except by order of the President, the Secretary of War, the commanding officer of the department, or by sentence of a general court-martial."

This article standing by itself might be authority for the discharge in question here raised, but it is an elementary rule that no part of a statute is to be read as if it stood alone and that the meaning of any one part is to be gathered from a view of the whole and of the context as a whole.

Now, we find explicit provisions for summary dismissal of *officers*, but none for the summary discharge of enlisted men; for example, taking money on mustering (Art. 6); making false certificates relating to absence or pay (Art. 13); suffering military stores to be damaged (Art. 15); being interested in the sale of victuals, &c. (Art. 18); using disrespectful words against the President (Art. 19); challenging another to fight a duel (Art. 26); being drunk on duty (Art. 38); failing to keep good order in his command (Art. 54); conduct unbecoming an officer and gentleman (Art 61); leaving confinement before being set at liberty (Art. 65). It is provided that no officer shall be discharged or dismissed from

the service except by order of the President, or by sentence of a general court-martial (Art. 99).

An officer summarily dismissed may have his dismissal reviewed by trial (*U. S. Comp. St.*, 1901, p. 868), but inasmuch as no such right is granted to enlisted men, it follows that Congress did not contemplate their summary discharge. Otherwise it must be held that Congress was willing to give an officer his day in court, but unwilling to give this fundamental privilege of a free man to an enlisted man. No such intention can be supposed in view of articles which explicitly give enlisted men the right to be tried when charged with any possible offence.

And here we may note a very significant distinction as regards the punishment of *officers* and *enlisted men*. An officer who, wilfully or through neglect, suffers to be lost, spoiled or damaged, any military stores shall be dismissed from the service (Art. 15); but an enlisted man who sells, or wilfully, or through neglect, wastes ammunition delivered out to him "shall be punished as a court-martial may direct" (Art. 16). A soldier who sells, or through neglect, loses or spoils his horses, &c., "shall be punished as a court-martial may adjudge" (Art. 17). Any officer who uses disrespectful words against the President shall be dismissed from the service, or otherwise punished as a court-martial may direct, but a soldier who so offends "shall be punished as a court-martial may direct" (Art. 19). An officer who challenges to a duel shall be dismissed from the service; but a soldier who so offends shall suffer such punishment as a court-martial may direct (Art. 26). An officer who is found drunk on duty shall be dismissed from the service, but a soldier who so offends shall suffer such punishment as a court-martial may direct (Art. 38).

An *officer* may be removed by the President, under his constitutional power of removal, which is correlative to his constitutional power of appointment.

There is a long line of opinions of the Attorney-General and cases to this effect, all of which turn on the point that the person removed was an *officer* of the United States. They do not apply to an enlisted man, as he is not *appointed* by the President.

4 *Op. Atty-Gen.*, 1.
4 *Id.*, 603.
6 *Id.*, 4.
12 *Id.*, 421.
15 *Id.*, 421.
Blake v. *U. S.*, 103 U. S., 227.
Street v. *U. S.*, 133 U. S., 299.
Mullan v. *U. S.*, 140 U. S., 240.
Hartigan v. *U. S.*, 196 U. S., 169.

Furthermore, by the 99th Article of War, no officer can be dismissed in time of peace, except in pursuance of the sentence of a court-martial.

The sections provide checks upon the power of the President to dismiss officers without trial. No express check, however, is provided in the case of enlisted men, so that the existence of these sections emphasizes the intention of Congress to make a distinction between the manner of dismissal of officers and of soldiers. It is inconceivable that Congress intended to deprive enlisted men of all protection against arbitrary Executive orders (see U. S. Rev. St., Sec. 1253).

An enumeration of the causes or offenses for which an enlisted man may be court-martialed, but emphasizes our point:

Wasting ammunition	Art.	16
Selling, losing or spoiling horses, accouterments, &c	"	17
Disrespectful words against the President, &c	"	19
Disrespect toward commanding officers	"	20
Striking a superior officer	"	21
Mutiny	"	22
Failing to resist mutiny	"	23

Refusing to obey officers or non-commissioned officers seeking to quell quarrels, frays, &c	"	24
Challenging to duels	"	26
Lying out of quarters	"	31
Absent without leave	"	32
Absent from parade without leave	"	23
Going more than one mile from camp without leave	"	24
Hiring another to do his duty	"	36
Drunk on duty	"	38
Sleeping on post	"	39
Quitting guard	"	40
Occasioning false alarms	"	41
Misbehavior before enemy, cowardice, &c	"	42
Compelling surrender	"	43
Disclosing watchword	"	44
Relieving enemy	"	45
Corresponding with enemy	"	46
Desertion	"	47 & 48
Advising to desert	"	51
Waste or spoil and destruction of property without orders	"	55
Violence to persons bringing provisions	"	56
Larceny, robbery, burglary and other crimes in time of war	"	58
Making false claims, agreement to obtain claimant of false claims, issuing false paper, perjury, forgery, delivering less property than called for, giving receipts without knowing truth thereof, selling, wrongfully selling, buying public military property	"	60

These enumerated offenses, with the provision for trial by court martial in each case, are followed by this *omnibus* provision:

> " ART. 62. All crimes, not capital, and all disorders and neglects, which officers and

> soldiers may be guilty of, to the prejudice of good order and military discipline, though not mentioned in the foregoing articles of war, are to be taken cognizance of by a general, or a regimental, garrison, or field officers' court martial, according to the nature and degree of the offense, and punished at the discretion of such court."

In addition, there is the specific provision, following logically the declaration in the first article, that the armies of the United States are to be governed " by the following rules and articles," that:

> " ART. 64. The officers and soldiers of any troops, whether militia or others, mustered and in pay of the United States, shall, at all times and in all places, be governed by the articles of war, *and shall be subject to be tried by courts-martial.*"

Article 66 prescribes that soldiers charged with crime shall be confined until *tried by court-martial*, or released by proper authority.

In addition, the Act of October 1, 1890, amended June 18, 1898 (*U. S. Comp. St.*, 1901, p. 961), being " An Act to Promote the Administration of Justice in the Army," provides for the assembling of a summary Court to try enlisted men accused of offenses not capital.

Article 70 prescribes that no officer or soldier put in arrest shall be continued in confinement more than eight days, " or *until such time as a court-martial* can be assembled."

Numerous military tribunals are provided by Congress for the trial of crimes and disorders to the prejudice of good order and military discipline, namely, general, regimental, garrison, or field officers' courts-martial (Art. 62). Certain offenses may be tried before summary Courts appointed by the commanding officer of a garrison, fort, or other place, regiment or corps, detatched battalion, or company, or other detachment of the army (Act of June 18, 1898, Chap. 469).

There were not wanting competent means, presented by Congress, therefore, of ascertaining the truth with respect to the guilt or innocence of the members of the discharged battalion. There was no excuse for the President's act, even if looked at from the point of view of emergency. It indicated distrust of the regularly prescribed tribunals. There was even less excuse for it than is sometimes offered for lynch law.

In the present case, every specific prescription of the Articles of War, with respect to preferring charges and bringing them to trial, was ignored. The only attempt to obey them was the preferment, on August 28, 1906, by First Lieutenant Supplee of charges against the petitioner. But these were withdrawn, we assume, because of the President's interference.

In view of these particular rules and regulations enacted by Congress for the *government* of the armies of the United States, the plaintiff-in-error claims that he has been deprived, without due process of law, of his right to serve out his term of enlistment. He demands the right, at least, to be heard in a proper tribunal, appointed by or under the Laws of Congress, where procedure and sentence will not depend upon the unrestrained will of a single individual. The Government cannot attach to the words, "except by order of the President," in Article 4, a meaning which the rest of Section 1342 does not justify. Can six words in but one of the 128 Articles of War be held sufficient to constitute the President of the United States a military dictator, whose will is above all law? Can they justify the contention, in view of the other provisions of the Articles of War, that there is inherent power in the President to punish by summary discharge without honor any enlisted man whom he *believes* to have been guilty of a crime? If so, why have any other Articles of War? Why not repeal them all, and leave the government and regulation, as well as the direction and com-

mand of the army, to the absolute and unrestrained will of the Commander-in-Chief?

We submit that a court of law must give a reasonable construction to these words. An officer may resign if his resignation is accepted by the President. An enlisted man cannot resign. The only way in which his enlistment can be terminated is by discharge, which cannot be given except as the result of a court-martial, or by order of the President, or of certain other designated officers of the army. This provision is used by the President and certain officers as authority to terminate an enlistment where a soldier so desires, but does not confer upon them the right to terminate the enlistment before it expires, *against the will* of the soldier. The services of an enlisted man during his term of enlistment can be terminated *against his will* only as the result of court-martial; but where a soldier consents, a discharge may be obtained by purchase or if he have a dependent parent.

The distinction between *voluntary* and *involuntary* discharges has been recognized by this Court. In *United States* v. *Kingsley*, 138 U. S., 87, an enlisted man who had been discharged against his will was allowed transportation and subsistence from the place of discharge to the place of enlistment, because the discharge was involuntary, while in *United States* v. *Barnett*, 189 U. S., 474, travel pay was denied because "he was discharged on his own application."

In view of the comprehensive provisions of the Articles of War for the punishment of offenses by court-martial, the negative provision that no discharge shall be given but by order of the President, or pursuant to sentence of court-martial, cannot be extended to grant discharges which the enlisted man is unwilling to accept. Parts of a statute must be read together, and where the statute provides for court-martial and discharge as a result thereof for all offenses, the right to discharge without trial cannot be read into the negative provi-

sions above referred to. It is unreasonable to suppose that Congress made elaborate provisions for ascertaining guilt and yet gave the President power to find a man guilty without pursuing this procedure.

The Government contends that it is part of the duty of the President as Commander-in-Chief of the army to keep in the army only such enlisted men as he has confidence in. This is not the view of Congress.

Article 54 of the Articles of War provides that it shall be the duty of every officer commanding in quarters, garrison, or on the march, to keep good order, and failure to do so makes him liable to dismissal from the service, or to be otherwise punished as a court-martial may direct. This article refers to complaints being made to the commanding officer of officers or soldiers beating or otherwise illtreating any person, disturbing fairs or markets, or committing *any kind of riot* to the disquieting of the citizens of the United States.

These offenses are of a class where it would be difficult to apprehend and convict the particular offender and the responsibility for such misconduct when such offender cannot be apprehended, is cast upon the commanding officer.

This section precisely covers the Brownsville case (assuming, for the sake of argument, that dismissed soldiers participated in the affray) and shows that it was not left to the President to keep orderly men in the service, but that the duty of maintaining order is cast upon the commanding officer and that if he fails to maintain order, he is to be punished.

VII.

The contention that the President acted according to precedent cannot be maintained, the so-called precedents cited by the Military Secretary have no application whatsoever to the present case. They were "hunted up" after the order was issued.

In the twenty-fifth paragraph of the answer it is alleged that "the President acted pursuant to precedents of the army established by cases, illustrative instances of which were stated in memoranda submitted by the Military Secretary of War," &c., and reference is made to Schedule J as containing the precedents referred to.

It is interesting to note that the President asked to have precedents for his action "looked up" *after* he had discharged the battalion.

The memorandum states:

> "A protracted examination of the official records has thus far resulted in failure to discover a precedent in the Regular Army for the discharge of those members of three companies of the Twenty-fifth Infantry who were present on the night of August 13, 1906, when an affray in the city of Brownsville took place."
>
> *Transcript of Record*, p. 32.

The allegation, therefore, that the President acted in accordance with precedent is as frivolous as the other allegation that the discharge was not intended as a punishment. The memorandum addressed to the Secretary of War by the Military Secretary on December 10, 1906, is as superficial as a legal opinion could possibly be. Its superficiality is confession of failure.

But it makes not a particle of difference whether precedents exist or not. Because the Constitution

has been violated once, or a dozen times, is no reason why it should be violated again. Nor is the fact that the constitutional rights of one citizen have been infringed any defense whatsoever to an action brought by another citizen to enforce these same constitutional rights. A man may waive a constitutional benefit. There is nothing to show that any other enlisted man has ever contested the right of the President to discharge. No case on this point has been found.

Thompson v. *Kentucky*, 209 U. S., 340, 346.

Rathbone v. *Wirth*, 150 N. Y., 459. 477.

It surely is unnecessary to argue to this Court that there may be a radical difference between the acts which the Commander-in-Chief may do in time of peace and those which, *ex necessitate*, he is permitted to do in time of war. In time of war officers and enlisted men, as is repeatedly set forth in the Articles of War, may be shot for offenses for the commission of which in times of peace they must be tried by court-martial. Martial law is a law of necessity that knows practically no restraints. It is based upon the law of self-preservation. In other words, in time of war, almost any measure (within the limits of the Hague Convention) may be justified which tends to make the army an engine of more certain destruction; so that any so-called precedents founded upon what occurred in a time of war can have no application to an occurrence in a time of profound peace.

> "The power to command depends upon discipline, and discipline depends upon the power to punish; and the power to punish can only be exercised in time of peace through the medium of a military tribunal."
>
> *Swaim* v. *U. S.*, 28 Court of Claims, 173, 221.

VIII.

The President's belief that the good of the service and the maintenance of the morale of the army required that there should be in the army only such troops as he could absolutely rely upon and safely quarter under arms among the people, is not a justification in law for the discharge without trial of 167 enlisted men accused of serious crime.

We submit that the contention of the twenty-fourth paragraph of the answer, to the effect that the discharge of the battalion was made, not as a punishment, but for the good of the service and maintenance of the *morale* of the army, in order that the latter should contain only such troops as the President, in his judgment, could absolutely rely upon and safely quarter under arms among the people of the United States, is wholly without the slightest justification in law or fact. That the discharge was intended as a punishment has already been shown. That the President believed his course a proper one to pursue does not make it legal. Where is wide and arbitrary discretion given to the President to determine questions of discipline? Discipline is a matter of rule and government. If President Lincoln had not the right to suspend the writ of *habeas corpus* in order to suppress incipient rebellion by breaking up a military command organized for the purpose of defying the authority of the United States in a time of war, how much less authority had President Roosevelt, in a time of profound peace, to suspend the right of trial by court-martial which the Articles of War have given to enlisted men, and to suspend the provisions of the Fifth

Amendment to the Constitution, which guarantee to every man, civilian or soldier, due process of law.

> "No graver question was ever considered by this court, nor one which more nearly concerns the rights of the whole people, for it is the birthright of every American citizen when charged with crime to be tried and punished according to law. The power of punishment is alone through the means which the laws have provided for that purpose, and if they are ineffectual, there is an immunity from punishment no matter how great an offender the individual may be, or how much his crime may have shocked the sense of justice of the country or endangered its safety. By the protection of the law human rights are secured; withdraw that protection and they are at the mercy of wicked rulers, or the clamor of an excited people."
>
> *Ex parte Milligan*, 4 Wall., 2.

We beg the Court's permission to quote again from *De Lolme on the English Constitution*, for what he says at the conclusion of Chapter XII, summing up the reasons why an accused party should be provided with all possible means of defense, is peculiarly appropriate:

> "Above all things, the whole proceedings ought to be public. The courts, and their different forms, must be such as to inspire respect, but never terror: and the cases ought to be so accurately ascertained, the limits so clearly marked, that neither the executive power, nor the judges, may ever hope to transgress them with impunity.
>
> "In fine, since we must absolutely pay a price for the advantage of living in society, not only by relinquishing some share of our natural liberty (a surrender which, in a wisely framed government, a wise man will make without reluctance), but even also by resigning part of our personal security—in a word, since all judicial power is an evil, though a necessary one, no care should be omitted to reduce as far as possible the dangers of it.
>
> "As there is, however, a period at which

> the prudence of man must stop, at which the safety of the individual must be given up, and the law is to resign him to the judgment of a few persons, that is (to speak plainly), to a decision in some sense arbitrary, it is necessary that the law should narrow as far as possible this sphere of peril, and so order matters that when the subject shall happen to be summoned to the decision of his fate by the fallible conscience of a few of his fellow-creatures, he may always find in them advocates, and never adversaries."

The clamor of the excited citizens of Brownsville was apparently sufficient to cause total disregard of orderly proceedings on the part of the authorities concerned in the discharge of this battalion. The will of the Executive supplanted the judgment of a court martial. It is pretended that the six words in the fourth Article of War, "except by order of the President," justified disregard of the specific provisions of the succeeding Articles which prescribe minutely how offenses against military discipline and good order are to be punished. If this contention be correct, then belief takes the place of proof; executive discretion the place of the judgment of a court-marshal. *Ex parte* investigation supersedes orderly trial, and the conclusions of an Inspector-General take the place of the findings of a military tribunal organized pursuant to the prescriptions of Congress.

If the President has the power to discharge enlisted men accused of serious offenses merely by executive order, so also has the Secretary of War and the commanding officer of the department. How easy, therefore, if the Government's interpretation of Article 4 is correct, it will become for a commander of a department to get rid of a troublesome company or regiment. The mere scratch of a pen will dispense with the necessity of following the procedure which Congress has carefully prescribed for the ascertainment of guilt on the part of enlisted men accused of serious offenses. They will be absolutely at the mercy of their commanding officers.

IX.

The President's act in ordering the discharge of the petitioner without trial is tantamount to nullification of the provision of the Constitution which gives Congress the power to raise and support armies. Arbitrary action by any branch of the Government is not favored in American jurisprudence.

If the Fourth Article of War is to be read in justification of the President's act, where does the right of the President, the Secretary of War, or the commanding officer of a department, to discharge enlisted men without trial, end? Where will the line be drawn between executive orders and decisions of courts-martial? How long will it be before courts-martial will be dispensed with altogether?

The case at bar presents, in very concrete form, the question as to how far arbitrary action in any department of Government is sanctioned by our jurisprudence. It presents squarely the question whether action of the kind disclosed by the papers in this case is not utterly foreign to the ideas upon which rests the framework of the Government of the United States and of the States composing it.

The thought which we desire to present to the Court in this connection cannot be expressed better than in the words of the constitutions of Kentucky and Wyoming which provide that absolute, arbitrary power over the lives, liberty and property of freemen exists nowhere in a republic, not even in the largest majority. As we shall argue later, enlistment does not deprive the soldier of his rights as a free man or citizen.

In *Standard Oil Co.* v. *United States*, decided by the Circuit Court of Appeals, Seventh Circuit, July 22, 1908, Grosscup, Circuit Judge, said:

> "We live under a guaranty that reaches back to the beginning of our law and is securely planted in every Constitution of civilized Government, that no one shall be punished until he has been heard; and above this fundamental guaranty there can be no higher prerogative, for let it once come to pass that under the stress of enforcing commericial equality any power in the Government may override the fundamental human right of being judged only after having been duly tried—a right just as essential to men in the associated relationship of the corporation as to men in the relationship as copartners to men individually—there will remain no commerce worth the name to safeguard. The beginning of commerce is constitutional government, and the foundation of constitutional government is the faith that every guaranty of our institutions, no matter what the provocation, will be sacredly observed."

Judge Grosscup said further:

> " No monarch, no parliament, no tribunal of Western Europe, for centuries, has pretended to have the right to punish except after due trial under all the forms of the law. Can that rightfullv be done here, on no other basis than the judge's personal belief that the party marked by him for punishment deserves the punishment? If so, it is because the man who happens to be the judge is above the law."

In *United States* v. *Delaware & Hudson Co.*, decided in the Circuit Court in the Eastern District of Pennsylvania within the last few months, being one of six cases argued before Dallas, Gray and Buffington, Circuit Judges, which arose under the so-called "commodities clause" of the Interstate

Commerce Act, as amended June 29, 1906, Judge Gray said:

> "We may assume, therefore, that the Commerce Clause of the Constitution is no exception to the general doctrine, that unlimited power has no place in American governmental institutions, and that there are rights of liberty and property that are secure against hostile legislative action. As has been well said, 'In a Constitutional Government, limitation is the abiding principle, exhibited in its highest form in the Constitution, as the deliberative judgment of the people, moderating every claim of right or use of power' (Prentice on Police Power) . . . .
>
> "The first ten amendments to the Constitution were admittedly intended to prevent abuse of the powers granted to the general Government, and of these, the fifth, among other things, provides: 'Nor shall any person . . . . be deprived of life, liberty or property without due process of law, nor shall private property be taken for public use without just compensation.' These inhibitions serve as a limitation upon the exercise of federal power, whether legislative, executive or judicial, and it is not surprising that they should be invoked as a protection against any action of the Federal Government, supposed to be injurious or destructive of the rights thus protected."

If the President or other officers can dispense with trial by a court-martial, there is nothing to prevent the discharge and disbandment of a whole regiment, brigade, division, or the entire army of the United States, by mere order, which will be but a step to the nullification of that subdivision of Article 1, Section 8, of the Constitution, which gives Congress the power to raise and support armies.

It cannot be said that this consideration is fanciful. The Constitution was not devised to endure only so long as the country should be blessed with Presidents without ambition to become arbitrary rulers, or to seize and enforce all the powers which

could by any possibility be implied from the terms of the Constitution. It was devised to prevent the possibility of despotism and arbitrary rule. However innocent the intentions of a particular President, no act of his which is in conflict with the spirit or the letter of the Constitution can be upheld. Dangerous precedents are inimical to the peaceful continuity of the free government established in 1789.

Chief Justice Taney refused to let considerations of revolution and treason justify the act of President Lincoln in suspending the writ of *habeas corpus* at his discretion, and to delegate his discretionary power to a military officer.

Ex parte Merryman, Taney's Reports, 246, 258, 260.

The jealousy with which the courts preserve the distinction between the powers of the three great co-ordinate branches of the Government, the care that they have shown that there shall be no intrenchment by one department upon the jurisdiction and powers of another, spring, it seems to us, out of that love for the rule of law which has been characteristic of the English race for centuries. When this Government was established its founders had before them the comparatively recent experience of the mother country in the times of the Stuarts and the period succeeding the English Revolution. The line of demarkation between the three great branches of the Government was therefore made sharp and clear. The hatred of Englishmen of the arbitrary prerogative of the Crown, that is to say, the autocratic authority of the state, "has," says Professor Dicey, "fostered the instinctive and strenuous effort to secure for the humblest Englishman the rule of law."

And in another place he defined the rule of law, which, he says, is as marked a feature of the United States as it is of England, as, "in the first place, the absolute supremacy or predominance of the reg-

ular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of the Government. Englishmen are ruled by the law, and by the law alone; a man with us may be punished for a breach of law, but he can be punished for nothing else."

Dicey's Law and Opinion in England, pp. 174, 215.

The petitioner has not been punished for a breach of the law, because there is not a scintilla of proof that he was guilty of the firing, or any part thereof, in Brownsville on the night of August 13, 1906. It may be said that he kept silence and refused to tell who was guilty of the firing. Where, in what Article of War, is there any provision which required him to tell what he did not know? There is no proof that he knew what he was commanded to tell. He has not been punished for a breach of the law, therefore, military or civil, but because he was suspected of knowing something or of having done something which he denies knowing or doing.

Clearly, the unrestricted right of the President to discharge enlisted men by Executive order without trial is inconsistent with the provisions of the Constitution which authorize Congress to raise and support armies and to make rules for their government and regulation.

X.

The petitioner upon enlistment acquired the right to serve out his term of enlistment unless legally discharged, and the right not to be punished except for violations of the Articles of War after court-martial.

Enlistment in the army has at least some attributes of property. It is the choice of a calling, each man being free to make one (*Slaughter House Cases*, 16 Wall., 116, 122).

Under Section 2 of Section 1118 of the Revised Statutes, the petitioner enlisted on July 18, 1904, for the term of three years (Petition, paragraph II).

Enlistment is a contract of employment, which can be terminated only according to law.

In re Grimley, 137 U. S., 147.

The right to serve out his term and receive the pay provided by law was a right possessed by the petitioner.

The Articles of War, Section 1342 of the Revised Statutes, begin with a recital that—

> "The armies of the United States shall be governed by the following rules and articles . . . . and the convictions mentioned therein shall be understood to be convictions by court-martial."

Article 2 provides that—

> "These rules and articles shall be read to every enlisted man at the time of, or within six days after, his enlistment, and he shall thereupon take an oath . . . . 'that I will obey the orders . . . . according to the rules and articles of war. . . . . '"

Article 128 provides that—

> "The foregoing articles shall be read and published, once in every six months, to every

> garrison, regiment, troop, or company in the service of the United States, and shall be duly observed and obeyed by all officers and soldiers in said service."

The Articles of War, called *rules* and articles in the preamble, are authorized by Article I, Section 8, of the Constitution, where power is given to Congress to make "rules for the government and regulation of the land and naval forces."

They are part of the contract of enlistment. Not only does the general rule that a statute is part of every contract made under it apply, but the articles are expressly connected with enlistment. They must be read to every man upon enlistment and once every six months thereafter, and the oath on enlistment specifically refers to the articles.

The petitioner upon enlistment became bound to obey the Articles of War, and conversely became entitled to the benefits thereof. One of such benefits was that he should be punished for offenses while in the service according to the Articles of War, which provide for trial by court-martial for any offense he might commit.

XI.

Enlistment in the army of the United States did not deprive the petitioner of his rights as a citizen.

Although the contract of enlistment differs in many respects from an ordinary contract, and although the status of the individual who enlists and his relations to the state and the public are changed, nevertheless authorities upon military law agree that an enlisted man does not thereby forfeit his rights as a citizen.

> "There is no principle more thoroughly incorporated in our military, as well as in our

civil code, than that a soldier does not cease to be a citizen, and cannot throw off his obligations and responsibilities as such. The general law claims supreme and undisputed jurisdiction over all. The military law puts forth no such pretensions. It aims solely to enforce, on the soldier, the *additional* duties he has assumed. It constitutes tribunals for the trial of breaches of *military* duty only. . . . . These two systems of law can, in no case, come in collision. Their spheres of action are different. The military code commences where the other ends. It finds a body of men, who, besides being citizens, are also soldiers. Their rights and duties, in their former capacity, it finds already well settled and established; but, in their latter capacity, their duties are undefined, their rights are unascertained until it steps in to fill this vacuum, to place the soldier as completely under cover of law and to guard him as securely against tyrannical and arbitrary power in his military as in his civil character. The one code embraces all citizens, whether soldiers or not; the other has no jurisdiction over any citizen as such."

O'Brien's American Military Law, 27.

The learned author says that the contrast between the European and American systems of military law is striking (p. 27):

"The former withdraws the soldier from the mass of citizens; the other leaves him, as it found him, still a citizen."

And again:

"Even the army of Great Britain, which most nearly resembles our own in its government, is very unlike it in this particular. One of the prerogatives of the King of England is that of making rules and articles of war, which all courts, military and civil, are bound to acknowledge as of the same force and legal effect as any act passed by the two Houses of Parliament—they become, in fact, the law of the land. The King can thus de-

> clare what shall be deemed military offenses, and can annex to the offense, thus defined, any punishment whatever. . . . . Were similar powers invested in the President of the United States, there might indeed be some ground for apprehending danger from our army. This not being the case, but, on the contrary, our military institutions being in accordance with our republican government, is it not resorting to the most unworthy species of demagogueism to decry our army as inimical to public liberty? Are not our soldiers also citizens, subject to all the obligations of such?" (*Id.*, p. 28).

He says of the powers of the President:

> "Perilous as it would be, to authorize the Executive to raise and organize an army, or to legislate for it, it would have been equally hazardous to confer on Congress the power of commanding the force it had created. If the one system might turn to despotism, the other would infallibly lead to oligarchy. The arrangement adopted harmonizes well with the theory of our institutions. . . . . In all that relates to the raising of an army, to its strength, to its organization, to its criminal code, Congress is omnipotent, the President powerless. . . . . This prerogative of command, so formidable in appearance, will, in practice, be found to be very limited, hemmed in and contracted as it may always be, by the position or negative action of the Legislature. The command of the President is, indeed, absolute within its sphere, but its sphere is bounded on all sides by law. The moment the Executive oversteps the boundaries prescribed, he become powerless and his commands are of no force" (*Id.*, p. 30).

Two highly important presumptions of law are referred to in the portion of the work devoted to the administration of justice in military courts:

> "The law presumes a man to be innocent until the contrary is proved, or appears from some stronger presumption." . . . .

> "No presumption of guilt arises from the silence of a prisoner when he was charged with having committed an offense" (*Id.* p. 175).

Professor Dicey, in his *Introduction to the Study of the Law of the Constitution* (6th Edition), says:

> "A person who enlists as a soldier in a standing army, or (to use the wider expression of modern Acts) 'a person subject to military law,' stands in a twofold relation; the one is his relation towards his follow-citizens outside the army; the other is his relation towards the members of the army, and especially towards his military superiors; any man, in short, subject to military law has duties and rights as a citizen as well as duties and rights as a soldier. His position in each respect is under English law governed by definite principles.
>
> "A soldier's position as a citizen.—The fixed doctrine of English law is that a soldier, though a member of a standing army, is in England subject to all the duties and liabilities of an ordinary citizen. . . . . A soldier by his contract of enlistment undertakes many obligations in addition to the duties incumbent upon a civilian. But he does not escape from any of the duties of an ordinary British subject" (p. 295).

The learned author also notes the very important doctrine which prevails with us as well, namely, that the civil law is superior to the military law in times of peace.

Speaking of the soldier's position as a member of the army, Professor Dicey continues:

> "A citizen on entering the army becomes liable to special duties as being 'a person subject to military law.' Hence acts which if done by a civilian would be either no offense at all or only slight misdemeanours, *e. g.*, an insult or a blow offered to an officer, may when done by a soldier become serious crimes and expose the person guilty of them to grave punishment. A soldier's offenses,

> moreover, can be tried and punished by a Court martial. He therefore in his military character as a soldier occupies a position totally different from that of a civilian; he has not the same freedom, and in addition to his duties as a citizen, is subject to all the liabilities imposed by military law: but though this is so, it is not to be supposed that, even as regards a soldier's own position as a military man, the rule of the ordinary law is, at any rate in time of peace, excluded from the army" (*Id.*, p. 301).

In *Ex parte Milligan*, 4 Wall., 2, the case of a citizen of Indiana who had been arrested by order of General Hovey, Mr. Justice Davis said (p. 120):

> "The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false; for the Government, within the Constitution, has all the powers granted to it, which are necessary to preserve its existence; as has been happily proved by the result of the great effort to throw off its just authority."

And again:

> "The discipline necessary to the efficiency of the army and navy, required other and swifter modes of trial than are furnished by the common-law courts; and, in pursuance of the power conferred by the Constitution, Congress has declared the kinds of trial, and the manner in which they shall be conducted, for offenses committed while the party is in the military or naval service. Every one connected with these branches of the public service is amenable to the jurisdiction which Con-

> gress has created for their government, and, while thus serving, surrenders his right to be tried by the civil courts."

In *United States* v. *Clark*, 31 Fed. Rep., 710, it is said (p. 713):

> . . . . "Each officer, from the general to the corporal, is invested with an arbitrary power over those beneath him, and the soldier who enlists in the army waives, in some particulars, his rights as a civilian, surrenders his personal liberty during the term of his enlistment, and consents to come and go at the will of his superior officers. He agrees to become amenable to the military courts, to be disciplined for offenses unknown to the civil law, to relinquish his right of trial by jury, and to receive punishments which, to the civilian, seem out of all proportion to the magnitude of the offense."

Judge Brown is careful to say that a soldier waives *in some particulars* his rights as a civilian. Thus, even in this statement of the necessary harshness of military discipline, we have the plainest possible intimation, not only that not all of the rights as a civilian are surrendered by the man who enlists, but that he can be punished only as military courts prescribe.

In *Dicey's Law of the Constitution* there will be found a discussion of the status of the English army under the British Constitution. The learned author reminds us that the English army, consisting of the regular army and of the militia, has been rendered subordinate to the law of the land. In the course of the discussion he quotes the following preamble to the first *Mutiny Act* (1 Will. & Mary, C. 5, of 1689):

> "Whereas no man may be forejudged of life or limb, or subjected to any kind of punishment by martial law, or in any other manner than by the judgment of his peers,

> and according to the known and established laws of this realm; yet, nevertheless, it (is) requisite for retaining such forces as are, or shall be raised during this exigence of affairs, in their duty an exact discipline be observed; and that soldiers who shall mutiny or stir up sedition, or shall desert their Majesties' service, be brought to a more exemplary and speedy punishment than the usual forms of law will allow " (p. 305).

Because the negro soldiers stationed at Fort Brown on and after August 13, 1906, denied guilt on their part or knowledge of the guilty parties, they were accused of having engaged in a "conspiracy of silence," whatever that may be. The presumptions of innocence so essential to the liberty of the individual were completely ignored.

The framers of the Constitution did not include a bill of rights therein. Alexander Hamilton argued that it might even be dangerous to do so (*The Federalist*, No. 84). But wiser counsels prevailed, and the first ten amendments to the Constitution were adopted almost immediately after the adoption of the original instrument itself.

> " The protection of the subject in the free enjoyment of his life, his liberty, and his property, except as they might be declared by the judgment of his peers or the law of the land to be forfeited, was guaranteed by the 29th chapter of Magna Charta, ' which alone,' says Sir William Blackstone, ' would have merited the title that it bears of the *Great* Charter.' The people of the American States, holding the sovereignty in their own hands, have no occasion to exact pledges from any one for a due observance of individual rights; but the aggressive tendency of power is such that they have deemed it of no small importance that, in framing the instrument under which their governments are to be administered by their agents, they should repeat and re-enact this guaranty, and thereby adopt it as a principle of constitutional protection. In some form of words, it is to be found in each of the State Constitutions."
>
> *Cooley's Constitutional Limitations*, 7th Ed., 500.

The same learned authority quotes with approval from *Norman* v. *Heist*, *5 W. & S., 171, 173*, the statement that the design is " to exclude arbitrary power from every branch of the Government " (*Id.*, 504).

We are not appealing from a judgment of conviction. We have no wish to secure immunity for the guilty. We do not contend that discipline may not be enforced in the military forces of the United States. The effectiveness of the army depends not alone upon the precision with which its military movements are carried out, but upon implicit and exact obedience to its commanders. Discipline, however, is a matter of regulation and government, not of caprice or individual whim. If the manner of enforcing it depended solely upon the will of the Commander-in-Chief, the temperament and personal attributes of each succeeding President would have to be taken into consideration, and the ideas of a kindly man would naturally differ from those of a martinet. The effect upon the army of these changing ideas of what constitutes discipline may better be imagined than described.

Swaim v. *U. S.*, 28 Ct. of Cl., at p. 221.

The wisdom of the fathers in giving Congress the power to make rules for the regulation and government of the military forces is again to be observed in this connection. Ample provision is made in the Articles of War, as we have seen, for the punishment of every conceivable offense against good order and military discipline. At the same time, the constitutional right of a soldier to be judged according to the law of the land is preserved. The very language and punctuation of the Fifth Amendment to the Constitution show a clear intention to preserve " due process of law " to soldiers, as well as to civilians. Nowhere in any definition of the phrase that we have been able to find is the *fiat* of an administrative or executive officer held to be the law of the land, where a person has been accused of an

indictable offense. If petitioner took part in the affray, he was at least guilty of manslaughter, for a citizen was killed by the raiders.

The law of the land in particular application to him gave him the right to be brought face to face with his accusers, to interpose any defense he might have—in short to a trial as the word is understood in our law, whether by a court-martial or by a jury. When he enlisted he may be deemed to have waived his right to a trial by jury; he certainly did not forfeit all right to a trial. Congress provided the kind of trial to which he should be subjected. It never intended to deprive him of a right to a trial by some tribunal. It never intended to subject him to the arbitrary judgment of the Executive, for it nowhere constituted the Executive a Court for the trial of offenders.

XII.

No citizen of the United States can be deprived of liberty or property without due process of law.

Perhaps no article of the Constitution has received less precise definition than the Fifth Amendment. This is necessarily the case, since what is due process of law, for example, must depend largely upon the particular circumstances of each case. The phrase was broadly defined by Daniel Webster, in his argument in the *Dartmouth College* case, 4 Wheaton, 518, 581, as follows:

> "By the law of the land is most clearly intended the general law; a law, which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty, property and immunities, under the protection of the general rules which govern society. Every thing which

> may pass under the form of an enactment, is not, therefore, to be considered the law of the land."

It has been defined as something which accords to every one the right to have notice of any proceeding by which his rights of life, liberty or property may be affected, and to be afforded an opportunity to defend, protect and enforce such rights in the ordinary proceeding adapted to the nature of the case.

Hurtado v. *California*, 110 U. S., 516.
Holden v. *Hardy*, 169 U. S., 366, 389.
St. Louis R. Co. v. *Davis*, 132 Fed. Rep., 633.
Simon v. *Craft*, 182 U. S., 427.
Wilson v. *Standefer*, 184 U. S., 399.
Davidson v. *New Orleans*, 96 U. S., 97.

The guarantee of due process of law is not confined to judicial proceedings, but operates as a restriction on every branch of the Government.

Chicago, etc., R. Co. v. *Chicago*, 166 U. S., 226, 233.
McGehee, Due Process of Law, 49, 60, 73, 76.

And see

Wynehamer v. *The People*, 13 N. Y., 378.

Liberty includes the right of a person to use his faculties in all lawful ways, to live and work where he will, to earn his livelihood in any lawful calling, and to pursue any lawful trade or avocation. Any law which impairs this right, or which limits one in his choice of a trade or profession, or restrains his otherwise lawful movements, is an infringement upon his fundamental rights of liberty.

Matter of Jacobs, 98 N. Y., 98, 106.
Allgeyer v. *Louisiana*, 165 U. S., 578.
Hovey v. *Elliott*, 167 U. S., 409.

Due process of law requires proceedings adapted to the nature of the case in which the citizen has an opportunity to be heard, to defend, protect and enforce his rights by establishing any fact which under the law would be a protection to him or to his property. His opportunity to defend must be real.

Guthrie, Fourteenth Amendment, 67.
Davidson v. *New Orleans*, 96 U. S., 97.
Stuart v. *Palmer*, 74 N. Y., 183.

The petitioner had the right to offer his services to the Government; and to enlist, upon being found to possess the qualifications prescribed in Sections 1116 to 1118, inclusive, of the Revised Statutes of the United States. Upon being enlisted, he became entitled to the rights of an enlisted man, which were, among others, the right to re-enlist, provided his previous service had been honest and faithful, and upon re-enlistment, to become entitled to additional pay (Act of August 1, 1894, Ch. 179, U. S. Compiled Statutes 1901, p. 814).

As an enlisted man, he had the privilege under certain circumstances, of being appointed a second lieutenant in the regular army (Act of Feb. 2, 1901, Ch. 192, U. S. Compiled Statutes 1901, p. 801).

He had the right to compete for promotion (Act of July 30, 1892, Ch. 328, U. S. Comp. Statutes, 1901, p. 855).

He would have been entitled during the third and succeeding years of enlistment to additional pay, and upon re-enlistment to still further pay (U. S. R. S., Secs. 1281-1284, incl., U. S. Comp. Statutes, 1901, pp. 912, 913).

As an enlisted man, he was entitled to certain rations (U. S. R. S., Sec. 1293).

He would have had the right to deposit his savings with any army paymaster and to receive interest thereon (*Id.*, Secs. 1305-1308, inc.).

He had the right to be tried and not punished unless convicted.

It cannot be pretended that these are not valuable rights and privileges. The petitioner was entitled to the protection of the Fifth Amendment, that is to say, to be secured in these rights and not to be deprived of any of them without due process of law. But it cannot be said that the Star Chamber proceedings, as a result of which these rights and privileges were taken away from him, constituted an opportunity to be heard, to defend, to protect and enforce his rights in an orderly proceeding adapted to the nature of the case. He was neither confronted with the witnesses against him, nor did he have the benefit of counsel.

Pollock's Essays in Jurisprudence, 212 to 221.

1 Holdsworth Hist. of Eng. Law, 277.

XIII.

Article 4 of the Articles of War did not authorize the discharge.

A.

ARTICLE IV. OF THE ARTICLES OF WAR IS A LIMITATION AND NOT A GRANT OF POWERS. A STATUTE MAY CONTAIN AN AFFIRMATIVE GRANT OF POWER OR IT MAY CONTAIN A LIMITATION.

This article provides that no enlisted man shall be discharged except by order of the President, the Secretary of War, the Commanding Officer of a department, or as a result of a court martial. It must be read in connection with the other Articles of War. They provide for cases where an enlisted man may be court-martialed and discharged as a result thereof. Where the ground for discharge is one of which a court-martial has cognizance, no

discharge can be granted except pursuant to the sentence of such a court.

In cases not covered by the provisions relating to offenses cognizable by a court-martial no discharge can be granted except pursuant to the orders of the President, or of such officers as are designated in Article 4. No grant of authority to issue discharges is given by that section and the authority of any officer therein enumerated to issue discharges must be found elsewhere.

The history of Article 4 shows that it was intended as a limitation. In England the control of the Crown over enlistment is not limited by any constitutional provision; the power of the commander-in-chief to grant discharges was never doubted. A practice had grown up whereby minor officers granted discharges (Bruce, *Institute of Military Law*, p. 239) and this was prohibited by the British Articles in 1774 (Davis, *Military Law*, 583), which were followed by Congress in forming the American Articles of War. But in England the control over discharge was in the commander-in-chief, while in this country it was in Congress under the Constitution. The English Article was a limitation on minor officers preventing them from exercising an admitted power of the commander-in-chief. This prohibition against acts of minor officers was adopted by Congress, and prevents them from exercising a power vested in Congress by the Constitution, and not a power of the commander-in-chief under the Constitution. In England the Crown had the power of discharge prior to the adoption of the Article of 1774, but in this country, when the similar article was adopted, the President, as commander-in-chief, had no such power. In each case we have a limitation on minor officers, but in neither case a grant of power to any one. The origin of the present Article 4, therefore, shows that it was intended to be nothing more than a limitation. The grant, if any, must be sought elsewhere.

An enlistment is a contract, and contracts can be terminated by the consent of both parties. Where the Government of the United States and an enlisted man mutually agree to terminate the contract relation, it can be done. But under Article 4, it cannot be done on the part of the Government except by order of the President, or one of the officers specified, if it can be done at all, except by purchase.

The Articles of War provide punishment by court-martial for many specified offenses committed by enlisted men, and, generally, for all offenses contrary to good order and military discipline. Read in connection with these provisions, Article 4 is seen to be a limitation and not a grant, and cannot be given the force of a grant of power to the President, or other officers therein mentioned, without holding that the President and the other officers have concurrent powers with the courts-martial provided for by the other Articles of War to take cognizance of the offenses therein referred to.

If Article 4 is treated as a grant of power, it follows that the President and each of the other officers mentioned therein has power to discharge in any and all of the cases where the Articles expressly provide for a court-martial. This is so contrary to the plain meaning of the Articles of War that no such construction should be adopted, and any other construction makes Article 4 merely a prohibition.

If Article 4 is to be treated as a grant of power to the President to discharge in cases cognizable by courts-martial, it is likewise a grant of similar powers to the other officers therein specified. It is not contended even by the Government that a commanding officer of a department could discharge an entire company without honor. If the President gets any such grant of power from Article 4, it would follow that a commanding officer of a department would have similar power because the Article

must be either a grant of power to, or a limitation upon all.

Any commissioned officer may be authorized to enlist a man into the army. An enlistment is a contract relation. An officer of a corporation, private or public, who has the power to bind his corporation by contract in the absence of any prohibition has the right to terminate such contract. It might well be contended that any officer of the army having the power to enlist would have the corresponding power to discharge. But to prevent any such inference Article 4 of the Articles of War enacts that no discharge shall be granted except by order of the President, the Secretary of War, the commanding officer of a department, or by sentence of a general court-martial. The conditions under which an order discharging a man may be given must be found in the other Articles of War.

B.

ANY POWERS CONFERRED BY ARTICLE 4 OF THE ARTICLES OF WAR ARE CONFERRED ALIKE UPON THE PRESIDENT, THE SECRETARY OF WAR, AND THE COMMANDING OFFICER OF A DEPARTMENT.

The only authority anywhere in the statutes of the United States upon which can be predicated the power of the President to issue the discharge under consideration consists in the six words in Article 4, "except by order of the President." The only other source of authority advanced by the Government is a vague and indefinite power supposed to inhere in the office of Commander-in-Chief. If the Government's contention that Article 4 confers power to discharge three companies without honor upon the President is held to be correct, the Court will thereby hold that a like power is conferred to discharge companies, battalions, regiments, or the whole army, upon the Secretary of War and the commanding officers of the numerous departments into which the army is divided.

This is the only possible interpretation of Article 4, if the Government's contention is right. The absurdity of supposing that Congress intended to confer such sweeping powers upon so many different officials is apparent upon the face of the statement.

C.

IF THE FOURTH ARTICLE OF WAR WAS INTENDED TO AND DOES AUTHORIZE THE PRESIDENT OF THE UNITED STATES TO DISCHARGE AN ENLISTED MAN, ACCUSED OF A CRIMINAL OFFENSE, WITHOUT TRIAL, IT VIOLATES THE FIFTH AMENDMENT OF THE CONSTITUTION.

The petitioner and other members of the battalion were charged with a criminal offense. It was said that they had been guilty of firing into the houses of Brownsville along the line of their raid, and their firing resulted in the killing of one man and the wounding of another. By the law of Texas manslaughter is defined as: "Manslaughter is voluntary homicide committed under the immediate influence of sudden passion arising from an adequate cause, but neither justified nor excused by law."

Penal Code, Article 698.

Therefore they were subject to indictment by a grand jury and trial by a petit jury. It will not be contended that a Judge of the Texas courts could have committed these men to imprisonment for the term prescribed as a punishment for the crime of manslaughter unless they had first been found guilty by a jury of the offense as charged in an indictment. But the Government claims that it can punish the men, not indeed by imprisonment, but by depriving them of their property right to serve out their enlisted terms, without trial, simply because an inspector-general of the Army decides that the evidence submitted to him convinced him that they were guilty "beyond a reasonable doubt."

The Fifth Amendment, however, provides that no person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces or in the militia, when in actual service in the time of war or public danger. But it prescribes that no person shall be deprived of life, liberty or property without due process of law. Now the petitioner, so long as he remained an enlisted man, could, under this amendment, have been tried by a court-martial without a presentment or indictment of a grand jury. But the amendment is equally precise in prescribing that he could not be deprived of life, liberty or property under any circumstances without due process of law. Due process of law, as we have seen, consists in opportunity to the accused to be heard in his own defense and to a trial. A trial embraces the idea of a charge, of the right to call witnesses and to present defenses—of the right to cross-examine witnesses presented in support of the charge and to the assistance of counsel. Clearly, if the President may, by executive order, punish a soldier accused of crime by discharging him without honor and without a trial that man goes forth into the world branded and disgraced. He has not had what in these days is called "a square deal." To assume and insist that he is guilty, although he denies guilt, to threaten that unless he confesses the guilt of which he is suspected he will be punished, to carry out the threat without confronting him with the witnesses against him and giving him a trial, do these conditions constitute due process of law? Obviously not.

But the guaranties of the Fourteenth Amendment, which are binding upon the States, as those contained in the Fifth Amendment are binding upon the Federal Government, "are sacred rights, which the Constitution of the United States guarantees to its humblest citizen against our present legislation, whether national or local, so that he

cannot be deprived of them without due process of law."

Bartemeyer v. *Iowa*, 18 Wall, 129.

"Whoever by virtue of public position under a State government deprives another of property, life or liberty without due process of law or denies or takes away the equal protection of the laws, violates the Constitutional inhibition."

Ex parte Virginia, 100 U. S., 339, 347.

The petitioner asks that he be given equal protection of the laws; that he be not discriminated against; that the presumption of innocence be not denied to him, even though he be under a contract which subjects him to military law. He seeks to have removed the stain which the order of the President has unjustifiably placed upon him.

XIV.

If the maintenance of discipline, or other necessities of the army, require that discretion to discharge without trial be given to the Commander-in-Chief, or other officers, it is a matter for legislation, and such discretion cannot be established by precedent, and should not be sanctioned by judicial legislation.

A.

The whole contention of the Government in its last analysis comes down to an argument of necessity. The references to implied powers of the Commander-in-Chief and the effort to seek authority in Article 4 of the Articles of War amount to nothing

more than attempt to justify the action of the President upon the ground of necessity.

Some may contend that a Commander-in-Chief ought to have the right to determine what man shall serve in the army and what man shall be discharged without trial. But Congress, which under the Constitution has the power to raise and support armies and to make rules for the government and regulation of the army, has not seen fit to confer such discretionary power upon the President or any other officer.

It may well be, as pointed out in Schedule J annexed to the answer, that a custom has grown up in the army of exercising such discretion in spite of the fact that no statutory authority therefor exists. There have been other cases where customs long established have been held illegal when the question of validity finally came before the courts.

The question of the validity of this particular custom has now come before a court, and the court is bound by the statutes and will not be controlled by real or fanciful arguments as to powers necessary to maintain good order and military discipline, but must test the custom by the Constitution and the statutes.

We have already seen that Congress has enacted comprehensive laws covering all possible occasions for discharges,—discharges upon expiration of enlistment, voluntary discharges, and discharges as punishment. Congress has not enacted any statute conferring any discretionary power to grant discharges in the President, or any one else. If it appears upon a consideration of this case that it would be well for the discipline of the army to have some such discretion vested in the President, or other officers, it is a question upon which Congress should act, and until Congress has so acted, and granted such discretionary powers, no court will assume by judicial legislation to create powers which Congress has failed to provide for by statute. The duty

of regulating the army rests upon Congress, not upon the President or the courts.

B.

The Government seeks to read into the Articles of War a provision giving the President the right *in his discretion* to discharge enlisted men whom he may consider unfit to serve longer in the army. But if Congress had intended to confer such discretion, it would have used appropriate language. Wherever it has done so in matters relative to the army, its language has been clear. For instance, by the Act of February 2, 1901 (31 Stat., 748) the act increasing the size of the regular army, it is provided that the President may, *in his discretion*, increase the number of corporals in any troop of infantry (Sec. 2); that second lieutenants of infantry or cavalry may, *in the discretion* of the President, be transferred to the artillery arm (Sec. 9); that the President, *in his discretion*, may increase the number of sergeants, corporals and privates in companies of infantry (Sec. 10); that the President, *in his discretion*, may increase the number of sergeants, corporals and privates in any company of engineers (Sec. 11); the President is authorized *in his discretion*, to form companies, organized as are companies of the regular army, of natives of the Philippine Islands (Sec. 36); *in his discretion*, he may continue, with their own consent, the volunteer officers and enlisted men of the Porto Rico regiment (Sec. 37).

Any portion of the cavalry force may be armed and drilled as infantry or dismounted cavalry, *at the discretion of* the President (U. S. R. S., Sec. 1105).

In time of peace, the President may, *in his discretion* and under such rules and upon such conditions as he shall prescribe, permit any enlisted man to purchase his discharge from the army. Act of June 16, 1890 (26 Stat., 157).

Engineers may, *at the discretion* of the President, be transferred from one corps to another (U. S. R. S., Sec. 1158).

He *may waive examinations* for the promotion of certain officers. Act of Oct. 1, 1890 (26 Stat., 562).

At his discretion he may nominate, and, by and with the advice and consent of the Senate, appoint to brevet rank certain officers for gallant service in action against Indians. Act of Feb. 27, 1890 (26 Stat., 13).

At his discretion, all officers of the regular army who served in the volunteer forces during the Civil War may receive a brevet in the regular army equal to the highest rank or brevet received in the volunteer forces. Act of Feb. 16, 1897 (29 Stat., 530).

Under certain circumstances, *in his discretion*, he may promote and commission as additional second lieutenants certain West Point cadets. Act of May 17, 1886 (24 Stat., 50).

He may detail such retired officers of the army and navy *as in his judgment* may be required, to act as instructors in schools in the United States. Act of Feb. 26, 1901 (31 Stat., 810).

He may make regulations for the government of the army, "in accordance with existing laws." Act of March 1, 1875 (18 Stat., 337).

There is no need to further multiply instances of provisions conferring discretion upon the President. The foregoing sufficiently indicate that where Congress has intended to vest the President with discretion in matters relative to the government of the army, it has done so in unmistakable language.

The only Articles of War which confer discretion upon any one are:

Article 2 (The oath of enlistment *may* be taken before any commissioned officer).

Article 11 (Certain officers *may* grant furloughs).

Article 17 (The President *may* prescribe limitations of punishments to be adjudged by courts-martial for certain offenses).

Article 30 (Soldiers *may*, in certain cases, appeal to a general court-martial).

Article 71 (Officers released from arrest *may*, under certain circumstances, be tried within certain periods).

Article 72 (Certain officers *may* appoint general courts-martial. The President is given power in this section to approve or issue orders in certain cases).

Article 75 (General courts-martial *may* consist of five to thirteen officers).

Article 78 (Certain officers *may* be associated with others on courts-martial).

Articles 73, 74, 81, 82 (Certain officers are made *competent* to do certain acts).

Article 109 (Under certain circumstances, the officer ordering the court *may* confirm sentence of court-martial).

Article 111 (An officer *may*, under stated circumstances, suspend execution of sentence).

Article 115 (Courts of inquiry *may* be ordered, in certain cases, by the President or any commanding officer, but by a commanding officer only upon demand of the officer or soldier concerned).

Except that courts-martial are given limited discretion as to the punishment or sentences to be given or imposed in specified cases, all the remaining prescriptions of the Articles of War are expressed in mandatory language.

No justification for the Government's contention on this subject can, therefore, be found in the legislation of Congress which, as we have seen, has exclusive power to make laws for the government of the army.

"Assuredly, the law never intended that the personal rights and safeguards of any person accused of crime, of crime which might involve property, or liberty, or life itself, should be dependent upon the discretion of a commanding officer.

Smith v. *United States*, *38 Ct. of Cl.*, *257*, *273*.

McBlair v. *United States*, *19 Ct. of Cl.*, *528*, *541*.

XV.

An enlisted man is not an officer of the Government within the meaning of the Act of March 3, 1887, as amended by the Act of June 27, 1898.

We doubt whether an army officer would listen with patience to an assertion that an enlisted man could, under any circumstances, be called an officer. While the officer's feelings might be due to prejudice or military tradition, it nevertheless finds abundant support in law.

The distinction between an officer and an enlisted man is made in paragraph after paragraph of the Articles of War, as well as in other sections of the Revised Statutes of the United States to which we refer.

1094, superseded by Act Feb. 2, 1901; 1104; 1108; 1261; 1280.

An enlisted man is a contractor with the Government.

> "This case involves a matter of contractual relation between the parties; and the law of contracts, as applicable thereto, is worthy of notice. The Government, as contracting party, offers contract and service. Grimley accepts such contract, declaring that he possesses all the qualifications prescribed in the Government's offer. The contract is duly signed. . . . .
>
> "Enlistment is a contract; but it is one of those contracts which changes the status; and where that is changed, no breach of the contract destroys the new status or relieves from the obligation which its existence imposes. Marriage is a contract, but it is one which creates a status. Its contract obligations are mutual faithfulness; but the breach of those obligations does not destroy the status or change the relation of the parties to each other. . . . . In other words, it is a gen-

> eral rule accompanying a change of statuts, that when accomplished, it is not destroyed by the mere misconduct of one of the parties, and the guilty party cannot plead his own wrong as working a termination and destruction thereof. . . . . By enlistment, a citizen becomes a soldier. His relations to the State and the public are changed. He acquires a new status, with corelative rights and duties, and although he may violate his contract obligations, his status as a soldier is unchanged. He cannot of his own volition throw off the garments he has once put on, nor can he, the State not objecting, renounce his relations and destroy his status."
>
> *In re Grimley*, 137 U. S., 147.

Now, the distinction between an officer of the United States and a contractor or mere employee is not a matter of guesswork or uncertainty.

> "An officer of the United States can only be appointed by the President, by and with the advice and consent of the Senate, or by a court of law or the head of a department. A person in the service of the Government who does not derive his position from one of these sources is not an officer of the United States in the sense of the Constitution."
>
> *U. S.* v. *Smith*, 124 U. S., 525, 532.

In that case it was held that clerks of a Collector of Customs were not appointed by the head of the department, and were not officers in the sense of the Constitution.

In *U. S.* v. *Mouat*, *124 U. S.*, *303*, it was held that a paymaster's-clerk appointed by a paymaster in the navy, with the approval of the Secretary of the Navy, was not an officer of the navy within the meaning of the Act of June 30, 1876. That act provided that the sum of eight cents per mile should be allowed to officers of the navy under certain circumstances in lieu of their actual expenses.

Both of these cases referred to the leading one of *U. S.* v. *Germaine*, 99 U. S., 508. In that case, a civil

surgeon appointed by the Commissioner of Pensions under Section 4777 of the Revised Statutes was indicted for extortion under the provisions of an act of Congress which provided that "every officer of the United States who is guilty of extortion under cover of his office" should be punished in a specified way. The Court held that a civil surgeon was not an officer of the United States.

But the Government contends that the few cases which have held letter carriers and others to be officers are authorities for its contention here. When these are examined, however, the distinction between them and the case at the bar becomes very clear.

Before considering them it is proper to say that the petitioner selected the forum in which this cause was tried in the expectation that it would eventually find its way to the Supreme Court of the United States.

The Act of March 3, 1887, explained by the Act of June 27, 1898, gives to the District Courts concurrent jurisdiction with the Court of Claims as to certain matters, including claims founded upon the Constitution of the United States, or any law of Congress, or for damages in certain cases not sounding in tort, &c., where the amount claimed does not exceed $1,000.

U. S. Comp. Stat., 1901, p. 753.

Appeals from judgments of the District Court lie to the Supreme Court direct "in any case in which the jurisdiction of the Court is in issue. . . . . In any case that involves the construction on application of the Constitution of the United States. . . . . In any case in which the constitutionality of any law of the United States . . . . is drawn in question."

Act of March 3, 1891 (U. S. Comp. Stat., 1901, p. 549).

But appeals are allowed from judgments of the Court of Claims on behalf of the plaintiff only where the amount in controversy exceeds $3,000.

U. S. Comp. Stat., 1901, Sec. 707.

Brief comment may be permitted upon the policy of the Government in raising the question of jurisdiction in a case of this character. As the question was raised below, though, in fairness, we admit it was not strenuously urged, we assume it will be raised here. We concede that the jurisdiction of a court may be questioned at any time by any party, and by the Court upon its own motion. But the present case is of general interest. The Brownsville affray, resulting in the discharge without honor of three companies of negro soldiers, is an episode that may become an historical event. The summary discharge, without trial, of 167 enlisted men from the army of the United States, in a time of profound peace, cannot be said to be a matter of mere routine. When one of the discharged soldiers comes into court, he is not less amazed at being called an officer of the Government than he is to find that Government raising a technical objection, which, if sustained, would prevent him from laying his case before the highest tribunal in the land for decision upon its merits. It seems to him that a free government should welcome judicial investigation of acts which are alleged to have been arbitrary and in violation of constitutional right.

The cases to which reference has been made are the following:

United States v. *McCrory*, 91 Fed. Rep., 295.

United States v. *Marsh*, 92 Fed. Rep., 689.

Strong v. *United States*, 93 Fed. Rep., 257.

McGregor v. *United States*, 134 Fed. Rep., 187.

The first was that of a letter-carrier, the second of a clerk in the Post Office Department, the third of a clerk in the Federal Court, and the last of a United States marshal. But each was apppointed by the head of a department, or by a court of law, thus falling clearly within the definition of a public officer contained in the *Smith* and *Mouatt* cases, *supra*. So far as the question of jurisdiction was raised, it was decided expressly upon that ground and those authorities.

There is no merit, therefore, in the Government's contention upon this point.

Chief Justice MARSHALL has said:

> "Although an office is an employment, it does not follow that every employment is an office. A man may certainly be employed under a contract, express or implied, to perform a service without becoming an officer."
>
> *U. S.* v. *Maurice*, 2 Brock., 96.

The fact that a person takes an oath before entering upon the discharge of duties under the Government is rightly held to be a criterion by which to judge whether or not he is an officer. But the authorities hold that it is not conclusive of his status.

> *Mechem's Public Offices and Officers*, Sec. 6.

The oath which the petitioner took upon enlist ment, however, is not to faithfully discharge the duties of an *office*, but to "bear true faith and allegiance to the United States of America, and that I will serve them honestly and faithfully against all their enemies whomsoever; and that I will obey the orders of the President of the United States, and orders of the officers appointed over me, according to the rules and articles of war."

> *Articles of War*, Art. 2.

The oath which officers of the Government are required to take is quite different. Section 1757 of

the Revised Statutes requires every person "elected or appointed to any office of honor or profit, either in the civil, military, or naval service," except the President, to subscribe to an oath that he will not only bear true faith and allegiance, but will also well and faithfully discharge the duties of the *office* on which he is about to enter.

The distinction between the oath of an officer and that of an enlisted man is highly significant. Common sense may appropriately be called upon to aid in the interpretation of statutes. If the word "officer" as used in the Act of 1898 can be stretched to cover an enlisted man in the army, it can be made to include every employee or agent, however menial his occupation. The decisions cited above, however, show that the word has a definite meaning and is not of universal application. Clearly, the Court has jurisdiction of this cause.

XVI.

The judgment should be reversed and the case remanded with instructions to sustain the demurrer.

> "There is no more sacred duty of a Court than, in a case properly before it, to maintain unimpaired those securities for the personal rights of the individual which have received for ages the sanction of the jurist and the statesman; and in such cases no narrow or illiberal construction should be given to the words of the fundamental law in which they are embodied."
>
> *Ex parte Lange*, 18 Wall., 163, 178.

December 7th, 1908.

Respectfully submitted,

CHASE MELLEN,
FRANCIS WOODBRIDGE,
Counsel for Plaintiff-in-error.

In the Supreme Court of the United States.

OCTOBER TERM, 1908.

OSCAR W. REID, PLAINTIFF IN ERROR,
v.
THE UNITED STATES.
No. 552.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISRICT OF NEW YORK.

BRIEF FOR THE UNITED STATES.

The case was heard on general demurrer (Rec., p. 36) to the "Third defence" of the answer (pp. 12-14). This defence set out the course of events as to the reports and investigations of the Brownsville affray upon which the President acted, and averred the special ground of that defence to be that—

> The said order of the President and the said discharge were made not as punishment of the petitioner or of others, but for the good of the service and for the maintenance of the morale of the army, and to the end that there should be in the army of the

> United States only such troops as the President in his judgment could absolutely rely upon and safely quarter under arms among the people of the United States.

The important question in the case, then, is whether the President of the United States has power summarily to dismiss a private soldier of the Regular Army before the expiration of his term of enlistment.

I.

JURISDICTION.

But first there is the point of jurisdiction. The Government does not urge this question, but is bound to present it. The court examines into its own jurisdiction or the jurisdiction of the lower court of its own motion, whether the question is raised and discussed by counsel or not. In *Great Southern Fire Proof Hotel Co.* v. *Jones* (177 U. S., 449) the court quotes from *Mansfield, etc., Ry. Co.* v. *Swan* (111 U. S., 379, 382), as follows:

> On every writ of error or appeal, the first and fundamental question is that of jurisdiction, first, of this court, and then of the court from which the record comes. This question the court is bound to ask and answer for itself, even when not otherwise suggested, and without respect to the relation of the parties to it.

The last case in which that doctrine was affirmed is *Louisville & Nashville R. R.* v. *Mottley* (opinion delivered by Mr. Justice Moody, November 16, 1908).

(a) The jurisdiction of this court.

The amount involved here is only $122.26. By section 707, Revised Statutes, an appeal by plaintiff from the judgment of the Court of Claims is allowed only where the amount in controversy exceeds $3,000. With respect to appeals and writs of error in cases brought in the Circuit and District courts the act of March 3, 1887, the "Tucker Act" (24 Stat., 505), provides:

> SEC. 4. That the jurisdiction of the respective courts of the United States proceeding under this act, including the right of exception and appeal, shall be governed by the law now in force, in so far as the same is applicable and not inconsistent with the provisions of this act. * * *
>
> SEC. 9. That the plaintiff or the United States, in any suit brought under the provisions of this act, shall have the same rights of appeal or writ of error as are now reserved in the statutes of the United States in that behalf made, and upon the conditions and limitations therein contained. * * *

In *United States* v. *Jones* (131 U. S., 1, 18) the court said, speaking by Mr. Justice Bradley, that—

> These provisions undoubtedly include the Court of Claims as well as the District and Circuit courts.
>
> * * * * *
>
> We cannot yield to the suggestion that any broader jurisdiction as to subject-matter is given to the Circuit and District Courts than that which is given to the Court

> of Claims. It is clearly the same jurisdiction—"concurrent jurisdiction" only—within certain limits as to amount; and the language in which those limits are expressed furnishes an additional argument in favor of the conclusion which we have reached.

In *United States* v. *Davis* (131 U. S., 36), brought like the previous case under the concurrent jurisdiction clause of the Tucker Act, appellee filed a motion to dismiss upon the ground that an appeal will not lie to the Supreme Court from a District Court where the matter in dispute does not exceed the sum of $5,000 (act February 16, 1875, 18 Stat., 315), and " that the United States are not entitled to a writ of error or appeal if the same remedy would not be afforded under similar circumstances to a private party."

Mr. Chief Justice Fuller, in delivering the opinion of the court, said:

> Inasmuch as the object of the latter act was to enable the District and Circuit Courts to exercise concurrent jurisdiction with the Court of Claims in respect to suits against the United States, as therein provided, in our judgment the right of appeal reserved to the Government " in the statutes of the United States in that behalf made," before the enactment of this act, was the right of appeal reserved in the statutes relating to the Court of Claims, and as that right could be exercised by the United States in the instance of any judgment of the Court of

> Claims adverse to the United States, it follows that the same right can be exercised by the United States in any case of the prosecution of a claim in the District or Circuit Courts of the United States under said act.

The converse of this proposition arose in the case of *Strong* v. *United States* (40 Fed., 183) and the motion of the Government to dismiss the appeal and writ of error was allowed because the amount involved was only $181. (This was in 1889, when cases were appealable from the district to the circuit courts.) Mr. Justice Lamar (on circuit) in delivering the opinion of the court said:

> The question to be considered and determined is, What statutes are here referred to as reserving the right of appeal to the plaintiff or to the United States? Are they the statutes generally governing appeals and writs of error, or are they those which specially govern writs of error and appeals in the Court of Claims?
>
> * * * * * * *
>
> We think the general scope and purpose of the act negatives the contention that any larger right of appeal is allowed in the district or circuit courts than is by the then existing statutes allowed in the Court of Claims. In other words, the peculiar nature of this enactment, and its special object, giving, as it does, a new field of jurisdiction to the United States courts, making it the same as the jurisdiction of the Court of Claims, within a limited amount, and the indications

> of the intention of Congress found in the context of the act, restrain the general words of section 9, relied upon by the attorney for appellant.

These cases, it is true, were decided before the passage of the Circuit Court of Appeals act, and the question now arising is whether Congress by section 14 of that act intended to repeal or modify the Tucker Act with respect to jurisdictional amount, and to permit the appeal of cases to the Supreme Court from the District and Circuit Courts under section 5 of the Circuit Court of Appeals act, which, owing to the amount involved, would not have been permitted had the cases been instituted in the Court of Claims.

The opposing brief says that—

> The petitioner selected the forum in which this cause was tried in the expectation that it would eventually find its way to the Supreme Court of the United States (p. 86).

So that the forum was deliberately selected in the face of the jurisdictional doubts, not really to go into a court of claims and secure the adjudication of this particular money demand against the United States, but simply in order to come into this court and argue the large constitutional claims set up. I do not mean to suggest that these claims are a mere pretext, but they are wholly without merit. A constitutional question to justify jurisdiction here must be real and substantial. The petitioner need not be surprised if he finds obstacles on the way

he has chosen. He can not do by indirection what he can not do directly.

His brief goes on to suggest that there is jurisdiction here under the Circuit Court of Appeals act, referring to those provisions of section 5 giving an appeal direct to this court from a district court "in any case in which the jurisdiction of the court is in issue. * * * In any case that involves the construction or application of the Constitution of the United States. * * * In any case in which the constitutionality of any law of the United States * * * is drawn in question."

As to the first clause, the question of jurisdiction alone must be certified to this court from the court below, at least under such conditions as exist here. (*United States* v. *Larkin*, 208 U. S., 333.)

As to the second clause, as I have already said, the constitutional question must be real and substantial, and I think I shall show hereafter that the claim that property has been taken without due process of law is quite untenable, and that this supposed constitutional question, if not a pretext, is at all events a mere makeweight and altogether fanciful.

The third clause does not appear to have any bearing in this case. I do not understand that any question of the constitutionality of a law of the United States is presented or urged.

The brief refers to the jurisdictional amount in a district court, namely, in cases where the amount claimed does not exceed $1,000, but no further ar-

gument is addressed to the question of jurisdiction in this court. The question is, however, whether section 14 of the Circuit Court of Appeals act has repealed or affected the previous jurisdiction on appeal from a district court as a court of claims to this court. That section repeals section 691, Revised Statutes, and section 3 of the act of February 16, 1875, under the authority of which appeals were previously taken to this court from the judgments of circuit courts in civil actions involving successively the sum or value of $2,000 and $5,000, and then provides:

> And all acts and parts of acts relating to appeals or writs of error inconsistent with the provisions for review by appeals or writs of error in the preceding sections 5 and 6 of this act are hereby repealed.

This appears to raise a novel question never passed upon or decided. The contention of the Government is that this repeal does not touch or affect the laws dealing with district and circuit courts as courts of claims. Congress never intended by this enactment to disturb that peculiar and special jurisdiction of the district and circuit courts. Therefore the doctrines of *United States* v. *Jones* and *United States* v. *Davis* (*supra*) apply now, and it is still the law that no broader jurisdiction as to subject-matter is given to the circuit or district courts than to the Court of Claims, and the jurisdiction is subject to the same limitation as to amount, and the right of appeal from the district and circuit courts is the same as from the Court of

Claims. If a case may not be brought into this court by a claimant from the Court of Claims because less than the jurisdictional amount is involved, even if a constitutional question is also involved, neither may it be so brought from a district or circuit court.

The general doctrine has recently been thus stated:

> It is elementary that repeals by implication are not favored, and that a repeal will not be implied unless there be an irreconcilable conflict between the two statutes. *And especially does this rule apply where the prior law is a special act relating to a particular case or subject and the subsequent law is general in its operation.*
>
> (*Petri* v. *Creelman Lumber Co.*, 199 U. S., 487, 497.)

A similar question was presented in *Dalcour* v. *United States* (203 U. S., 408). The aspect of the matter there was this: An act of 1860 (sec. 11, act June 22, 1860, 12 Stat., 85, 87) provided in mandatory form for an appeal by the United States from the decree of a district court on a claim of title to certain public lands. The jurisdiction of this court was denied by the appellees on the ground that the Circuit Court of Appeals act lodged appellate jurisdiction in such a case in that court. But this court held that, although that enactment was "intended to supersede previous *general* provisions, and to establish in what cases and to what courts appeals might be taken from the district

courts," the "jursdiction of this court given by section 11 of the act of 1860 remains unchanged." The court emphasized "the unusual form of a positive requirement" found in the mandatory provision of the statute, but also rested its decision on the ground that—

> This is a provision based on a specific policy with regard to a certain class of claims. It is not a matter of general principle, but a special trust.

In that case the Government cited *In re Hohorst* (150 U. S., 653, 661), among other cases, in which the court, speaking by Mr. Justice Gray and referring to the original jurisdiction conferred by the act of August 13, 1888 (25 Stat., 433), says:

> The grant to the circuit courts of the United States, in this section, of jurisdiction over a class of cases described generally as "arising under the Constitution and laws of the United States" *does not affect the jurisdiction granted by earlier statutes to any court of the United States over specified cases of that class.*

And the Government distinguished the case of *Gwin* v. *United States* (184 U. S., 669), because the matter actually decided there was that a decree rendered in 1900 may not be appealed to a court whose jurisdiction to review it was taken away in 1864, the court saying:

> Even if the Court of Appeals act do not apply to this case, the jurisdiction of this

court was clearly taken away by the act of 1864 and transferred to the Circuit Court of the United States for California.

There is another aspect of this matter: Prior to the Tucker Act the District Courts had no jurisdiction of Tucker Act cases. The Circuit and District Courts, though created by statute, exercise a common-law jurisdiction; that is to say, their jurisdiction, while created and defined by statute, is of the nature of common-law jurisdiction. At common law the Government could not be sued.

Under the Tucker Act the right of appeal from the District Court was, as I have shown, according to the statutes then in force, providing for appeals from the Court of Claims.

United States v. *Davis, ante* (131 U. S., 36).
United States v. *Yukers* (60 Fed., 641).
United States v. *Coudert* (73 Fed., 505).

In the case last cited the court says concerning the Circuit Court of Appeals act:

"The fifth section provides six classes of cases in which appeals or writs of error may be taken directly to the Supreme Court from those courts, *and which do not include cases arising therein under the act of March 3, 1887.*"

See also *Chase* v. *United States* (155 U. S., 489).
United States v. *Harris* (76 Fed., 241).
United States v. *Ady* (id., 359).

In *United States* v. *Morgan* (64 Fed., 4, 6), Judge Sanborn says:

"The act of 1887 * * * expressly provides in section 4 that the right of exception and appeal in all proceedings under that act shall be governed by the *law then in force.*"

I have already referred to the views on the subject expressed by Mr. Justice Lamar in *Strong* v. *United States* (40 Fed., 183).

The Circuit Court of Appeals act did not diminish or enlarge the preexisting right of appeal from or error to District and Circuit Courts, but only fixed anew in what cases and by what courts those appeals and writs of error should be heard and determined. That act referred to common-law cases in the Circuit and District Courts, to cases in which the statutory jurisdiction was as at common law and not to the claims jurisdiction and money demands against the sovereign unknown to the common law.

If the claimant in this case has the right to an appeal or writ of error, then the Tucker Act, granting the jurisdiction to the District Court, would be unconstitutional, because it fails to give a *jury trial,* in violation of the seventh amendment to the Constitution.

In the opinion in the Dalcour case the court also says, referring to the Circuit Court of Appeals act:

> But the statute recognizes, in addition to the exceptions which it enumerates, others

> where it is "otherwise provided by law." These words must be taken to refer to existing provisions and not to be merely a futile permission to future legislatures to make a change. They do not save every existing provision, of course, or the act would fail of its purpose. But they save some.

That phrase is used in section 6 of the Circuit Court of Appeals act with reference to appeals from the district or circuit courts to the Circuit Court of Appeals, but I submit that the force of the phrase permeates the scheme of the act and applies throughout the act wherever it is necessary or appropriate to effectuate the purpose of Congress. It is not necessary that it should be repeated at every such point, and its meaning and relation to the law must be reckoned with and are controlling in the construction of the repeal provision of section 14. The preexisting statutes as to the Court of Claims jurisdiction and appeals to this court are existing provisions of law which are saved. The Circuit Court of Appeals act did not supersede those previous special provisions; as to that narrow and peculiar jurisdiction, it was "otherwise provided by law."

In *Lau Ow Bew* v. *United States* (144 U. S., 47, 56, 57), the court, speaking through the Chief Justice, held that these words were inserted in the statute in order to guard against implied repeals and are to be construed as referring only to laws in force at the time of the passage of the act. (See also

Louisville Public Warehouse Co. v. *Collector,* 49 Fed., 561, 564, 565, Mr. Justice Jackson, then circuit judge; *United States* v. *Sutton,* 47 Fed., 129, 130.)

(b) The jurisdiction of the lower court.

The Tucker Act, as amended by the act of June 27, 1898 (30 Stat., 494), provides (sec. 2):

> The jurisdiction hereby conferred upon the said Circuit and District courts shall not extend to cases brought to recover fees, salaries, or compensation for official services of officers of the United States.

Although a private soldier stands in emphatic contrast to an officer *of the army,* he may be for all that within the meaning of the term " officer of the United States " as used in this act. The legal meaning of the term " officer " and the intention of Congress in using it are not to be controlled by its ordinary use in common speech as a military term. Having regard to its meaning as related to public service in general, it is submitted that in legal intendment the word " officer " fitly describes a soldier of the United States. Blackstone's definition shows the broad meaning of the term when unrelated to military prepossessions:

> Offices, which are a right to exercise a public or private employment, and to take the fees and emoluments thereunto belonging, etc. (2 Bl. Com., 36.)

Lord Chief Justice Best's definition is:

> Everyone who is appointed to discharge a public duty, and receives a compensation in

> whatever shape whether from the Crown or otherwise is constituted a public officer. (*Henly* v. *Mayor of Lyme,* 5 Bing., 91.)

In *United States* v. *Hartwell* (6 Wall., 385), this court defines office as—

> A public station or employment conferred by the appointment of government. The term embraces the ideas of tenure, duration, emolument, and duties.
>
> The term officer, in its common acceptation, is sufficiently comprehensive to include all persons in any public station or employment conferred by government. (*Vaughn* v. *English,* 8 Cal., 39.)
>
> A public office is the right, authority, and duty, created and conferred by law, by which, for a given period, either fixed by law or enduring at the pleasure of the creating power, an individual is invested with some portion of the sovereign functions of the government, to be exercised by him for the benefit of the public. The individual so invested is a public officer.
>
> Mechem, *Public Offices and Officers,* sec. 1. See also *Wood's Case,* 2 Cowp., 30.

These definitions are very broad, and show that the term in its general aspect is not to be restricted to any particular branch of the public service or by any idea of relative rank therein or of the character of the service rendered. So considered they are not inconsistent with what was said by Chief Justice Marshall in *United States* v. *Morris* (2

Brock., 96), distinguishing in certain respects an employment from an office; and it will be seen that there is no constant test to be applied in all cases, the line of demarcation between an office and an employment being somewhat vague and indefinite.

Can it be said that an enlisted man of the army is an "officer of the United States?" His "public station or employment" is "created and conferred" pursuant to Article I, section 8, of the Constitution, empowering Congress to "provide for the common defence" and "to raise and support armies." He is an agent of the State, and is employed "to discharge a public duty." His "tenure, duration, emolument, and duties" are specifically provided by statute. He is invested with a modicum of the "sovereign functions of government" just as surely as is the officer above him, and these he exercises "for the benefit of the public." He is for the time being an integral and necessary part of the machinery of government, and just as essential to the organization and maintenance of the army as the commissioned officer. In short, the position or post of an enlisted man contains all of the elements of a public officer. That being true, it necessarily follows that he is to be regarded as a public officer or an officer of the United States. No reasonable distinction can be drawn between his status and that of a letter carrier, who was expressly declared to be an officer of the United States in a suit involving the very act under consideration (*United States* v. *McCrory,* 91 Fed., 295). It is

impossible to perceive that a letter carrier enjoys any greater "portion of the sovereignty of the country" than does the private soldier. They both subscribe to an oath. The positions of both are the creature of statute. The "tenure, duration, emolument and duties" of the one are no more fixed by law than those of the other.

The definitions of *officer* given above include within their scope a private soldier of the United States. His service is continuous, his duties prescribed by law and the regulations of the Government, and his functions are discharged in behalf of the public. Referring again to the contrast between the terms "officer of the Army" and "officer of the United States," the former is by common usage limited in application to persons in positions of command, and describes the relations existing between such persons and those whom they command and direct rather than the relation which both in common sustain to the Government which they serve.

The Constitution does not forbid this construction. The provision involved is Article II, section 2, paragraph 2, which is as follows:

> [The President] shall nominate, and by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which

> shall be established by law: but the Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of Departments.

The question of the sense in which the words "officer of the United States" are used is one of legislative intent in each case. Congress may employ those words in a wider sense than the Constitution.

In *Ex parte Smith* (2 Cr. C. C., 693) it was held that a clerk in the Treasury Department, appointed not by the President or the head of a department, but by one of the Comptrollers, was an executive officer of the Government, the ground of the decision being that the intent of Congress was to exempt from military duty persons in the civil service of the United States.

In *United States* v. *Tinklepaugh* (3 Blatchf., 425) it was held that a deputy United States marshal was an officer of the United States, the court referring to the power of the marshal to appoint one or more deputies who are removable from *office,* etc., and saying further:

> If a deputy marshal can be removed from office, he is an officer before he is so removed, for he can not be removed from office unless he is an officer; and, as he has power to serve process; he is an officer of the United States empowered to serve process. (Id., p. 429.)

Thus the court made no attempt to bring the case within the constitutional provision, but decided it

upon the ground that *officer* as used in the statute under consideration was clearly meant to cover a deputy marshal in discharge of his duty.

An illustration of the point that the scope of the term depends on the intent of Congress is afforded by the cases of *United States* v. *Mouat* (124 U. S., 303), and *United States* v. *Hendee* (id., 309). In the Mouat case it was held that a paymaster's clerk, appointed by a paymaster of the navy with the approval of the Secretary of the Navy, was not an officer of the navy within the meaning of an act of Congress allowing mileage to officers of the navy. The court cited the *Germaine* case (99 U. S., 508), which is chiefly relied upon by the petitioner herein, using the following language:

> Unless a person in the service of the Government, therefore, holds his place by virtue of an appointment by the President or of one of the courts of justice or heads of departments authorized by law to make such an appointment, he is not, *strictly speaking,* an officer of the United States.

But the closing words of that opinion are these:

> Undoubtedly Congress may have used the word " officer " in some other connection in a more popular sense, as will be shown in the case of *United States* v. *Hendee* immediately following this, in which case *it will be the duty of the court, in construing such an act of Congress, to ascertain its true meaning and be governed accordingly.*

In *United States* v. *Hendee* the very same sort of person, namely, a paymaster's clerk, was held to be an officer of the Government within the meaning of an act of Congress respecting longevity pay.

I submit that *United States* v. *Hendee* is controlling upon the contention that Congress may use the word "officers" in a wider sense than it is used in the Constitution.

The only question, then, is whether a fair and reasonable construction of this statute may include soldiers of the United States.

As to *United States* v. *Germaine* (*ante*) and *United States* v. *Smith* (124 U. S., 525), in which it was held that those who are not appointed as the Constitution prescribes can not be officers of the United States, those were criminal cases, and the intent of Congress to use the term in a wide sense was not sufficiently evident to overcome the rule of strict construction in criminal cases.

The construction which the Government now proposes is in accordance with the intent of Congress, and that is shown by the obvious purpose of the statute. The report of the Judiciary Committee of the House (No. 325, Fifty-fifth Congress, 2d session) shows the evils to be remedied and the object of the law. The report states the reasons for the change which the amendment of 1898 made, inter alia, as follows:

> First. The Circuit and District courts are widely separated geographically, and often while one of them may be deciding a question

in one way another may be deciding it another way, and there is now a large number of conflicting judgments on the same questions.

Second. Cases are brought against the United States at places remote from the Capital, of which the proper Department is not advised, and proper defenses are impracticable and are often not made.

The object of the law was to secure uniformity in decisions relating to fees, compensation, and salaries of officers of the United States.

It is obvious, then, that the act was intended to reach and correct just such suits as the one brought by this petitioner. The claims of soldiers against the United States are as clearly within the policy of this act as those, for instance, of clerks of district or circuit courts. The reasons advanced by the Judiciary Committee apply with equal force in the case of soldiers, viz: the possible diversity of adjudications on similar states of fact, distance from Washington, where department files are kept, absence of knowledge of the department that claims are being litigated. It is evident that it is highly desirable, if not essential, to concentrate at the seat of government where the records are kept and in the Court of Claims proper *all* suits for statutory compensation for official services, and the statute should be read in the light of that fact.

I submit that the appeal herein must be dismissed because of the want of jurisdiction in this court, or that the petition must be dismissed for want of jurisdiction in the court below.

It is, however, very desirable that this court should, if possible, determine the important questions involved in the controversy, and I therefore pass to the consideration of the merits.

II.

THE QUESTION ON THE MERITS.

(a) The supposed constitutional question.

The contention of petitioner is that he held a contract with the United States by virtue of his enlistment, and his discharge before the end of the term amounted to depriving him of property without due process of law.

That contention is not tenable, and there is in reality no such constitutional question in the case. It is perfectly well settled that public service, both civil and military, creates no vested right in an office or employment. A soldier's enlistment is not different from any other public service.

The power to appoint includes the power to remove. The latter power is incident to the former. It has been the settled rule from the beginning of the Government that every appointive office in the federal service, civil or military, excepting the judiciary, is held subject to the discretionary power of removal by the President of the United States.

In *Parsons* v. *United States* (167 U. S., 324, 328–331), the subject was exhaustively reviewed, beginning with the great debate of 1789, and the court finds that the question of constitutional power has been determined in favor of the President, and approves the view that the power of removal is vested in the President, although the appointment is by the President and Senate, citing among other authorities 1 Lloyd's Congressional Register, 350, 351; 1 Kent's Com., 310; 2 Story on the Constitution, secs. 1542–1544; 2 Johnson's Impeachment Trial, 314, remarks of Wm. M. Evarts. (See also 4 Elliott's Debates, 350–404.)

"The opinions of the law officers of the Government have been in harmony with the foregoing views" (*Parsons case*, 167 U. S., at p. 332); and the rule has been established by an unvarying line of decisions as to commissioned officers in the army and navy. (*In re military power of President*, 4 Op. A. G., 1; *In re Du Barry*, 4 Op., 603; *In re Col. Belger*, 12 Op., 421; see also 15 Op., 421; *Blake* v. *United States*, 103 U. S., 227; *Street* v. *United States*, 133 U. S., 299; *Mullan* v. *United States*, 140 U. S., 240; *Hartigan* v. *United States*, 196 U. S., 169.)

As to the tenure of office statutes of 1866, repealed in 1887, the court has this to say referring to a contention that the result of the repealing act was to limit the power of the President even more than it was supposed to have been limited before:

> This could never have been the intention of Congress. On the contrary, we are satis-

> fied that its intention in the repeal of the tenure of office sections of the Revised Statutes was again to concede to the President the power of removal if taken from him by the original tenure of office act, and by reason of the repeal to thereby enable him to remove an officer when in his discretion he regards it for the public good, although the term of office may have been limited by the words of the statute creating the office. (*Parsons* case, 167 U. S., at p. 343.)

The conclusion is that the whole civil service and all military and naval officers have been from the beginning of the Republic subject to the unlimited power of removal by the President. The first Congress decided that this power was exclusively vested in the President. That is an express declaration in the *Parsons* case. With the doubtful exception already considered, Congress has not sought to impose any conditions upon the President's constitutional power of dismissal. Whenever a statute has come before this court involving an apparent restriction of the President's power, it has been so construed as to leave the power unimpaired. (*Blake* v. *United States, Parsons* v. *United States, ut sup.*) The power of Congress to restrict the President's constitutional right has been significantly left open when not expressly doubted by the courts. (*Shurtleff* v. *United States*, 189 U. S., 311; *Carr* v. *Gordon*, 82 Fed. Rep., 373.)

But if there were any real doubt whether the unrestricted power of removal was conferred upon

the President alone, or the President's power could be controlled and the power exercised by Congress, in no aspect can it be maintained that a vested right of property is involved. In *Crenshaw* v. *United States* (134 U. S., 99), a cadet midshipman was discharged under the act of August 5, 1882, limiting appointment to the navy and marine corps, and providing that graduates of the Naval Academy who do not receive appointments shall be given a certificate of graduation, an honorable discharge, etc. The claimant contended the act was unconstitutional " for the reason that he held an office by contract with the United States and was entitled on graduation to be a midshipman to serve for life or during good behavior." The court held as follows (pp. 104, 108):

> The primary question in this case, one which underlies the first, second, and third of appellant's propositions stated above, is whether an officer appointed for a definite time or during good behavior had any vested interest or contract right in his office of which Congress could not deprive him? The question is not novel. There seems to be but little difficulty in deciding that there was no such interest or right. * * * The great question of protection to contract rights and vested interests, which forms such an interesting and important feature of our constitutional law, is not dominated by the turn of a phrase. Our courts, both State and national, look on these questions through the form to the substance of things; and, in sub-

> stance, a statute under which one takes office and which fixes the term of office at one year or during good behavior is the same as one which adds to those provisions the declaration that the incumbent shall not be dismissed therefrom. Whatever the form of the statute, the officer under it does not hold by contract. He enjoys a privilege revocable by the sovereignty at will.

The President is charged by the Constitution with the responsibility and duty of seeing that the laws are faithfully executed, as well as with the command of the army. The simple fact is that the private soldier is an integral part of the body of those who are to execute the laws, and the President has as clear a right to dismiss him as to dismiss a Cabinet officer.

This is an appropriate place to say that on the theory most favorable to the petitioner, namely, that the engagement is to be treated merely as a civil contract of hire, it is terminable at the will of the master or employer for or without cause, especially since on the face of this contract the possibility of discharge before the end of the period is expressly contemplated.

But this is not the nature of a contract of enlistment. Enlistment is a service which can be terminated at the will of the sovereign or commander.

Our military establishment was modeled upon the British, and our original and present Articles of War, including Article 4 (*post*), were drawn

from the British articles. Under the British system power to dismiss soldiers at will is vested in the sovereign as commander in chief.

> Though the engagement is made for a term certain, the Crown is under no obligation to retain the soldier, either in pay or in arms, for that period, but may discharge him at any time. * * * The safety of the realm may depend in some measure on the immediate discharge or dismissal of any man or regiment in arms. (II Clode, Military Forces of the Crown, 40.)

Any military officer may be dismissed "simply by notice in the Gazette that the Crown has no longer occasion for his services." (*In re Tufnell*, L. R., 3 Ch. Div., 164, 173.)

Under the earliest British articles and the method of regimental recruiting then prevailing by contract between the Crown and the regimental commander, the power to discharge was lodged in the colonel. (Davis Military Law, 576.) But since the year 1783 enlistments in the British service have been made directly by the Crown, and the corresponding power to discharge has been reserved to the Crown and is exercised either directly or through military commanders duly authorized. The language of the English form of enlistment, which is the predecessor of our own, is equally significant with our own. The soldier enlists for "a stated period," provided the Crown should "so long require his services" (II Clode *et sup.*, 36, 38–41).

The same view of an enlistment prevails under American law. The service is terminable at the will of the employing power. The nature of the contract is briefly set forth in *In re Grimley* (137 U. S., 147):

> This case involves a matter of contractual relation between the parties, and the law of contracts as applicable thereto is worthy of notice. The Government, as contracting party, offers contract and service. Grimley accepts such contract, declaring that he possesses all the qualifications prescribed in the Government's offer. The contract is duly signed. Grimley has made an untrue statement in regard to his qualifications. The Government makes no objection because of the untruth. The qualification is one for the benefit of the Government, one of the contracting parties. Who can take advantage of Grimley's lack of qualification? Obviously only the party for whose benefit it was inserted. Such is the ordinary law of contracts. * * * Enlistment is a contract, but it is one of those contracts which changes the status, and where that is changed, no breach of the contract destroys the new status or relieves from the obligations which its existence imposes. * * * By enlistment the citizen becomes a soldier. His relations to the state and the public are changed; he acquires a new status with correlative rights and duties, and although he may violate his contract obligations, his status as a soldier is unchanged. * * *

> An army is not a deliberative body. It is the executive arm. Its law is that of obedience. No question can be left open as to the right to command in the officer, or the duty of obedience in the soldier.

In *United States* v. *Cottingham* (1 Rob. (Va.), 615, 629), the court (Baldwin, J.) holds that enlistment is undoubtedly a contract in a certain sense—

> inasmuch as it is an engagement between the parties for a service to be rendered by one of them, in consideration of a compensation to be yielded therefor by the other. But it wants one of the usual requisites of contracts, a reciprocal obligation in regard to the subject-matter. On the one hand, the recruit is bound to serve during the full term of his enlistment; but on the other, *the Government is not bound to continue him in service for a single day, but may dismiss him at the very first moment, or at any subsequent period, whether with or without cause for so doing.* It has, moreover, a feature not to be found in most contracts, namely, a power in one of the parties to compel specific performance from the other by the exercise of physical force. If the soldier desert, he may be recaptured and coerced to the discharge of his duty by corporal restraint and punishment. These important traits of the engagement result not so much from the specific terms of the compact as from the relation in which it places the parties toward each other—a relation of authority and control on the one side, and of obedience and submission on the other.

In *United States* v. *Blakeney* (3 Grat. (Va.), 405, 409), the court says:

> The enlistment is usually spoken of as a contract, and without impropriety, inasmuch as that expresses the mutual consent of the parties; but it is a contract of a peculiar nature, placing the parties in a new and important relation towards each other, that of commander and soldier, by which *the liberty of the citizen is greatly abridged, and the authority and control of the Government greatly enlarged.* The compact, in its principles and consequences, is certainly widely different from the ordinary civil compacts between individuals. The latter spring from the relative interests of the parties; the former from their relative duties. *The military compact may be dissolved at any moment by the supreme authority of the Government;* the civil compact usually requires for its dissolution the mutual consent of the parties, and is sometimes incapable of dissolution by the consent of both. I do not, however, object to the name of contract as applied to a voluntary enlistment; the name is unimportant, unless we suffer it to mislead us as to the true character of the thing.

This case was cited with approval by the Supreme Court in *In re Morrissey* (137 U. S., 157, 159).

The history and language of the fourth article of war providing for discharges show that the purpose is not to secure a valuable contract to the pri-

vate soldier, but to secure the Government against losing its men. The formalities surrounding discharge were and are for the purpose of preventing desertion or irregular discharges resulting in the depletion of the troops, especially when recruiting proceeded under a contract between the Crown and the commander, and the colonel was in a sense the proprietor of the regiment. (Bruce, Institutions of Military Law, 239; Dig. Op. J. A. G., 4.) For this reason the evolution of the articles resulted in this provision of the British articles of 1774, in force during our revolution:

> ARTICLE 1. After a noncommissioned officer or soldier shall have been duly enlisted and sworn, he shall not be dismissed our service without a discharge in writing, and no discharge granted to him shall be allowed of as sufficient which is not signed by a field officer of the regiment into which he was enlisted, or commanding officer, where no field officer of the regiment is in Great Britain. (Davis Military Law, 583.)

This article was adopted in substantially the same form into the American articles of 1776, and was continued with slight modifications in the articles of 1806 (2 Stat., 259), and the latter articles have been reenacted and embrace the present fourth article of war with little change.

Thus historically and in fact the object of the formalities relating to discharge was to protect the Government against loss of the soldier, and not to protect the soldier against loss of employment.

(b) The constitutional power of the President.

It is on such historical beginnings that the authority of the President to discharge a soldier under his power as Commander in Chief of the Army and Navy of the United States is founded. The President's powers as Commander in Chief are not defined by the Constitution, and must be derived from the nature of the office itself and in the light of the powers of a commander in chief at the time of the adoption of the Constitution. The right of summary dismissal was one of the inherent powers of the Commander in Chief at that time, and as such was conferred upon the President by the Constitution.

The framers of the Constitution did not attempt to define the extent of the powers granted to the President as Commander in Chief, and those powers are substantially the same as the powers of the Crown as commander in chief. The extent of the power as that of other powers created by the Constitution was left to be determined by the nature of the office and in the light of the practice of England and of other sovereign governments at the time of the adoption of the Constitution. (*Ex parte Milligan,* 4 Wall., 2, 139; *Legal Tender Case,* 110 U. S., 421, 447; *Swaim* v. *United States,* 165 U. S., 553.) The grant of power to the Commander in Chief, as was said by Mr. Chief Justice Chase in *Ex parte Milligan,* implies "many subordinate and auxiliary

powers," and includes "all authority essential to its exercise."

For example, in *Swaim* v. *United States* this court was called upon to pass on the inherent power of the President to convene a general court-martial. It was urged there as here that the President's power is confined to the specific enumeration in the Articles of War and the right to appoint a general court-martial was challenged, and this court was pressed then as it is now to hold that Congress was vested with "the power to make rules for the government and regulations for the land and naval forces." The court, however, sustained the contention of the Government and held that the President had inherent power as Commander in Chief to appoint general courts-martial. This decision is "a striking illustration of an undefined constitutional power, for it is nothing less than the power to constitute tribunals with judicial jurisdiction extending even to trials for capital offenses." (Dig. Op. J. A. G., 715.)

But it was contended below, and will be contended here, that the existence of power in England in the British commander in chief is no warrant for an equivalent power on the part of the American commander in chief. This pretension was disposed of long ago by Attorney-General Clifford in 4 Op., 603, 612. After referring to the power of the English Crown to dismiss military officers without trial by court-martial as authority for a similar power

in the President, the learned Attorney-General, afterwards Mr. Justice Clifford of this court, said:

> The force of this analogy can not be avoided on the ground of any substantial difference in the laws and usages of the respective countries growing out of the rules and articles of war. England, like our own country, has a special code for the trial and punishment of military offenses. The mutiny act, as it is called, was passed in 1689. It is annually reenacted, and, excepting about two years in the reign of William the Third, has been in force ever since.

Those remarks of Justice Clifford dispose of the petitioner's contention against the power of dismissal on the part of the President, the contention being founded on the existence of a code in our Articles of War for military offences for which an enlisted man may be court-martialed.

There is not the slightest reason for the claim that unrestricted power of discharge, which is merely enforcement by the commander in chief "of the law of obedience," is a relic of absolutism and arbitrary monarchical oppressions contrary to the spirit and fundamental principles of our institutions. It is a power always and everywhere incident to the special nature of *military* service, and was freely exercised by the commander, whether he was the chief of a horde, or stadt-holder, or king, or president.

(c) The Power of the President under the statutes.

I submit that Judge Hough was right in thinking it unnecessary to consider the question whether the President has inherent constitutional authority as Commander in Chief in the absence of congressional statutory action, because "in this case the President acted in accordance with the various acts of Congress regulating the army and discharges therefrom."

The President's power of summary discharge has been expressly recognized by the Articles of War from their first enactment to the present time. The articles of 1806 were the first articles enacted after the adoption of the Constitution (2 Stat., 359), and article 11 reads as follows:

> After a noncommissioned officer or soldier shall have been duly enlisted and sworn, he shall not be dismissed the service without a discharge in writing, and no discharge granted to him shall be sufficient which is not signed by a field officer of the regiment to which he belongs, or commanding officer where no field officer of the regiment is present; *and no discharge shall be given to a noncommissioned officer or soldier before his term of service has expired but by order of the President,* the Secretary of War, the the commanding officer of a department, *or the sentence of a general court-martial;* nor shall a commissioned officer be discharged the service but by order of the President of the United States or by sentence of a general court-martial.

The power of the President under this article is emphasized by comparison with the power under the Confederation. Under the Articles of Confederation executive power was lodged in Congress, and Congress on May 31, 1786, passed a resolution relating to military affairs, the thirteenth article of which is as follows:

> ART. 13. No commissioned officer shall be cashiered or dismissed from the service excepting by order of Congress or by the sentence of a general court-martial; and no non-commissioned officer or soldier shall be discharged the service but by the order of Congress, the Secretary of War, the Commander in Chief, or commanding officer of a department, or by the sentence of a general court-martial. (Hetzel's Military Laws of the United States, 3d ed., p. 36.)

This article is the exact counterpart of article 11 of the Articles of War of 1806, excepting that while in the Confederacy the power of dismissal was vested in Congress, that power was withdrawn from Congress and vested in the President when the Constitution made the President the Executive and Commander in Chief of the army.

Article 11 of the articles of 1806 remained undisturbed until 1866, when the act was passed purporting to limit the power of the President to discharge military or naval officers in time of peace (sec. 5, 14 Stat., 92), one of the tenure of office acts to which I have already referred. Nothing could show more clearly that Congress conceived the previous right to dismiss and discharge as vested in the

President, and sought to limit this power by express enactment, leaving undisturbed the existing power of the President to discharge enlisted men.

Under the Revised Statutes, article 11 of the act of 1806, so far as referring to enlisted men, became the present fourth article of war (sec. 1342, Rev. Stat.), which is as follows:

> ART. 4. No enlisted man, duly sworn, shall be discharged from the service without a discharge in writing signed by a field officer of the regiment to which he belongs, or by the commanding officer when no field officer is present. And no discharge shall be given to any enlisted man before his term of service has expired, *except by order of the President, the Secretary of War, the commanding officer of a department, or by the sentence of a general court-martial.*

As Judge Hough remarks, "I am quite unable to perceive how the President's right to terminate a soldier's engagement could be more explicitly recognized, and indeed conferred."

The contention that the power to discharge is dependent on the finding of a court-martial for offenses enumerated in other Articles of War is not deserving of much consideration. A plain reading of article 4 disposes of it. The power before the expiration of the service is given in the disjunctive—by order of the President *or* by sentence of a court-martial, and not by order of the President *upon* sentence of a court-martial. A reference to article 11 of the articles of 1806 puts this interpre-

tation beyond doubt. There it was provided that an officer shall not be discharged except by order of the President or by sentence of court-martial. It has already been stated that Congress in its conflict with President Johnson in 1866 endeavored to limit his power by providing that in times of peace an officer shall not be discharged except by court-martial. The limitation thus sought to be placed upon the President in dismissing officers was entirely unnecessary if, as petitioner claims, the President's power of discharge is wholly limited and conditioned by the finding of a court-martial provided for in other articles.

The contention that provisions for the punishment of enumerated offenses by sentence of a court-martial resulting in discharge from the service exclude the right of the President given in the fourth article of war to discharge a soldier summarily, when in his opinion the discipline of the army demands it, fails to distinguish the difference between a discharge by way of punishment and a discharge operating as a termination of service by the Commander in Chief arising from the very nature of military organization.

The right of dismissal by the President has been upheld by this court in *United States* v. *Kingsley* (138 U. S., 87), where the court assumed as of course the power of the "proper authorities" to order the summary discharge of a soldier, and the unlimited power of discharge was expressly pointed

out in the case of *Grimley* v. *United States* (32 C. Cls., 285, 295), where the court says:

> Power to discharge a soldier is a discretion vested in the President, exercised by him through the Secretary of War; and it is essential to the due exercise of this discretion that he have power to exercise it upon conditions prescribed by himself; and this power the judiciary does not desire to question or curtail.

The power of dismissal by the President has the sanction of uninterrupted administrative practice. The series of formulated rules under which the President has always summarily dismissed private soldiers is contained in the various army regulations promulgated from time to time, all recognizing that article 4 of the present Articles of War and the equivalent antecedent statutes expressly sanction the President's right to dismiss. (Army Regulations of 1821, article 71, par. 9; act of March 2, 1821, 3 Stat., 615; Army Regulations of 1841, art. 31, par. 130.) The Army Regulations of 1857, art. 19, par. 159, provide:

> No enlisted man shall be discharged before the expiration of his term of enlistment *without authority of the War Department, except by sentence of a general court-martial,* or by the commander of the department or of an army in the field, on certificate of disability, or on application of the soldier after twenty years of service.

The Army Regulations of 1904 covering this petitioner's discharge provide (par. 138):

> An enlisted man will not be discharged before the expiration of his term, except:
>
> 1. By order of the President or Secretary of War.
>
> 2. By sentence of a general court-martial or military commission.
>
> 3. On certificate of disability or under rules governing discharge by purchase, by direction of the commander of a territorial department or army in the field.
>
> 4. In compliance with an order of one of the United States courts, or a justice or judge thereof on a writ of habeas corpus.

Such regulations are more than expressions of administrative practice; they have the force of law. (*United States* v. *Eliason*, 16 Pet., 291; *Ex parte Reed*, 100 U. S., 13; *Kurtz* v. *Moffitt*, 115 U. S., 487.)

The petitioner contends that in discharging him the President ignored paragraph 146 of the Army Regulations, which relates to the character to be given a soldier on his discharge from service. The reading of this regulation and its connection with the preceding paragraph show that it is applicable exclusively to discharge at the expiration of the enlistment term. Paragraph 138 is the regulation dealing with discharge before the expiration of the term; paragraph 146 with discharge at expiration. The latter paragraph shows this on its face by the provision that "where the company commander

deems the service not honest and faithful, he shall, if practicable, so inform the soldier at least thirty days prior to the discharge," clearly meaning thirty days before discharge at the end of the term.

In any event paragraph 146 does not apply to discharges by the President, for it is well settled that such purely executive regulations—

> prescribed and framed by the Secretary of War, and which are intended for the direction and government of the officers of the army and agents of the department, do not bind the Commander in Chief nor the head of the War Department. (*Smith* v. *United States,* 24 C. Cls., 209; see also *United States* v. *Burns,* 12 Wall., 246.)

The discharge of the petitioner by the President was merely a termination of the service and not a punishment for misconduct. A discharge without honor is not a punishment. The issue of such discharges is regulated by paragraph 148 of the Army Regulations, prescribing *inter alia* that—

> Blank forms for discharge and final statements will be furnished by the Military Secretary of the Army, and will be retained in the personal custody of company commanders. Those for discharge will be of three classes: For honorable discharge, for dishonorable discharge, and for discharge without honor. They will be used as follows: * * *
>
> 2. The blank for discharge without honor when a soldier is discharged—

(*a*) Without trial on account of fraudulent enlistment.

(*b*) Without trial on account of having become disqualified for service, physically or in character, through his own misconduct.

(*c*) On account of imprisonment under sentence of a civil court.

(*d*) Where the service has not been honest and faithful—that is, where the service does not warrant his reenlistment.

(*e*) When discharge without honor is specially ordered by the Secretary of War for any other reason.

3. The blank for dishonorable discharge or dishonorable discharge by sentence of a court-martial or military commission.

These three forms of discharge are thus clearly commented upon and distinguished by the Judge-Advocate-General (Op. J. A. G., 1901, p. 318):

> At present there are three kinds of discharges expressly recognized, to wit: The honorable, the dishonorable, and the discharge without honor. The dishonorable discharge is given only in the case of discharge by sentence of court-martial. The discharge without honor is given in the cases first specified in circular 15, Headquarters of the Army, 1893; but this circular did not *create* such discharge; it merely gave it a name. Before the issue of the circular and as far back as the rebellion (notwithstanding that it was from time to time theoretically asserted that the only kind of discharges known to the law were the honorable and the

> dishonorable, and that all discharges except by sentence of court-martial were honorable) a third kind of discharge was out of necessity resorted to. It is now recognized that there is a kind of discharge which is neither honorable nor technically dishonorable, but must be classified by itself—this is the "discharge without honor." There were many soldiers summarily discharged during the rebellion for causes tainting the character of their discharges. In numerous cases the orders were made to read *dishonorably* discharged, although a dishonorable discharge in the technical sense of that term can not be imposed except by sentence of a court-martial. A summary discharge can not be a dishonorable discharge, if the term is used in such technical sense, but it may be for a cause tainting the character of the discharge—a discharge manifestly not honorable. Such a summary discharge is now called a discharge without honor. Its name, however, is only important as a recognition of a discharge, not technically dishonorable, but not honorable in fact.

This distinction is by no means a new one. It is as old as organized military institutions and was established in the Roman military law which recognized three kinds of discharge:

> This dismission of soldiers among the Romans was either honorable or ignominious or indifferent. * * *
>
> The other kind of dismission which they called indifferent was when a soldier was

> discharged without any mark, either for honor or disgrace put upon him. (Bruce on Military Institutions, Title 11, p. 319 *et seq.*)

"The discharge without honor is not a punishment. When a soldier is discharged before or on expiration of service, he is entitled to a certificate to that effect, but he is not entitled to a certificate of honorable discharge (which is now only given to soldiers whose service has been honest and faithful), if, in fact, his service has not been honest and faithful. In such case he has failed to earn an honorable discharge and is given a discharge which discloses that fact—a discharge without honor." (Op. J. A. G., 1901, p. 319.)

It has been decided by this court that a private soldier's discharge does not constitute a punishment, but is merely the termination of his service. In *Kingsley* v. *United States*, ante, the court held, referring to section 1290, Revised Statutes, that the statute contemplates a discharge as a punishment inflicted by the judgment of a court-martial or other military authority for a specific offense and not such a discharge as was issued in that case for unfitness for service, etc. "We can not consider such discharge as 'a punishment for an offense' within the meaning of the statute." The same distinction was pointed out in Thompson's case, 22 Op A. G., 36.

Judge Hough says in the closing paragraph of his opinion (Rec., p. 40):

> It is, however, further asserted that some infraction of law was wrought by forcing

upon Reid a "discharge without honor." The phrase is not known to the statutes; it is found only in the Army Regulations which are from time to time promulgated by the Secretary of War, but do not bind either the Secretary that makes them and much less the Commander in Chief. (*Smith* v. *U. S.*, 24 C. Cl., 209.) The exact method of this soldier's discharge and the *quantum* or kind of character that should be given him, not being regulated by statute, must necessarily be left in the discretion of the executive officer having power to grant some kind of discharge. That it is beyond the power of the judicial branch to coerce or review the discretion of the Executive is familiar doctrine while that a discharge with a very bad character is not a punishment to the man discharged within the meaning of any federal statute is settled by *U. S.* v. *Kingsley*, 138 U. S., 87.

I submit finally that the power of summary dismissal vested in the President involves an exercise of discretion not reviewable by the courts.

The statement of this doctrine by Mr. Justice Story in *Martin* v. *Mott* (12 Wheat., 19, 31–32) is exactly applicable to the present case:

> Whenever a statute gives a discretionary power to any person, to be exercised by him upon his own opinion of certain facts, it is a sound rule of construction that the statute constitutes him the sole and exclusive judge of the existence of those facts. And in the present case we are all of opinion that such is the true construction of the act of 1795.

> It is no answer that such a power may be abused, for there is no power which is not susceptible of abuse. The remedy for this, as well as for all other official misconduct, if it should occur, is to be found in the Constitution itself. In a free government the danger must be remote, since in addition to the high qualities which the Executive must be presumed to possess, of public virtue and honest devotion to the public interests, the frequency of elections and the watchfulness of the representatives of the nation carry with them all the checks which can be useful to guard against usurpation or wanton tyranny.

I respectfully submit that the appeal or the petition should be dismissed or the judgment below affirmed.

HENRY M. HOYT,
Solicitor-General.

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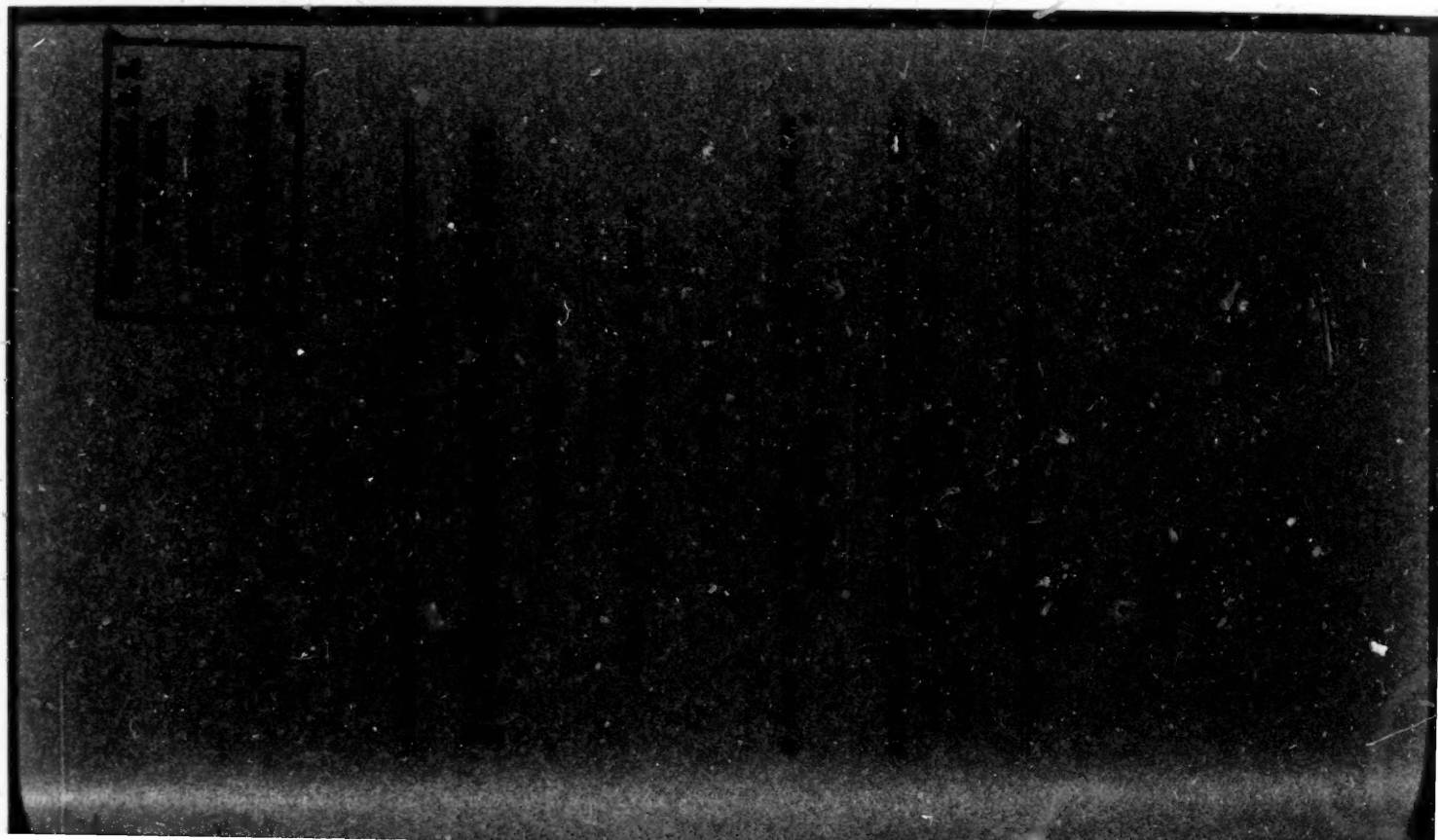

In the Supreme Court of the United States.

OCTOBER TERM, 1908.

OSCAR W. REID, PLAINTIFF IN ERROR,
v.
THE UNITED STATES.
No. 552.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF OF THE JUDGE-ADVOCATE-GENERAL OF THE ARMY, AS AMICUS CURIÆ, FILED BY LEAVE OF COURT.

STATEMENT OF THE CASE.

This is a case involving the right of a former private of the Regular Army, who was discharged without honor by the President, to recover pay from the date of his discharge to the date of the expiration of his term of enlistment.

The petitioner enlisted as a private in the infantry arm of the service on July 18, 1894, to serve "for a period of three years, *unless sooner discharged by proper authority.*" His connection with the military service was severed on November 9, 1906, in the operation of a "discharge without honor," and he now brings this action under the Tucker Act to re-

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cover the sum of $122.96—the amount alleged to be due him as pay from November 16, 1906, to July 18, 1907, the date of the expiration of his original contract of enlistment.

ISSUE.

The issue presented is: "Has the President of the United States power to discharge summarily an enlisted man of the Regular Army before the expiration of his term of enlistment?"

1. The power of the President to summarily discharge an enlisted man from the military serivce has been expressly recognized by the Articles of War without interruption from their revision in 1806 to the present time.

1A. *Enlistments in the military service.*—Before an enlisted man can be discharged from the military service, he must first enter that service. Prior to the enactment of the articles of 1806, enlistments were regulated by the requirements of section 3, article 1, of the code of 1776, which provided that:

> Every noncommissioned officer and soldier who shall enlist himself in the service of the United States shall at the time of his so enlisting, or within six days afterwards, have the articles for the government of the forces of the United States read to him and shall, by the officer who enlisted him or by the commanding officer of the troop or company into which he was enlisted, be taken before the next justice of the peace or chief magistrate of any city or town-corporate, not being an

officer of the army, or, where recourse can not be had to the civil magistrate, before the judge advocate, and in his presence shall take the following oath or affirmation, if conscientiously scrupulous about taking an oath:

I swear or affirm (as the case may be) to be true to the United States of America and to serve them honestly and faithfully against all their enemies or opposers whatsoever, and to observe and obey the orders of the Continental Congress and the orders of the generals and officers set over me by them.

Which justice or magistrate is to give the officer a certificate, saying that the man enlisted did take the said oath or affirmation. (Sec. 3, article 1, resolution of Congress, September 20, 1776.)

Article 10, Code of 1806, provided that:

Every noncommissioned officer or soldier who shall enlist himself in the service of the United States shall, at the time of his so enlisting or within six days afterward, have the Articles for the Government of the Armies of the United States read to him, and shall, by the officer who enlisted him or by the commanding officer of the troop or company into which he was enlisted, be taken before the next justice of the peace, or chief magistrate of any city or town corporate, not being an officer of the army, or where recourse can not be had to the civil magistrate, before the judge-advocate, and in his presence shall take the following oath or affirmation: "I, A. B., do solemnly swear, or affirm (as the case may be),

> that I will bear true allegiance to the United States of America, and that I will serve them honestly and faithfully against all their enemies or opposers whatsoever; and observe and obey the orders of the President of the United States, and the orders of the officers appointed over me, according to the Rules and Articles for the Government of the Armies of the United States." Which justice, magistrate, or judge-advocate is to give to the officer a certificate, signifying that the man enlisted did take the said oath or affirmation. (Art. 10, act of April 10, 1806, 2 Stat. L., 259.)

This is now accomplished by the execution of a formal contract of enlistment, or by the voluntary acceptance on the part of the soldier of the military status which is evidenced by the receipt of pay, rations, and other benefits which are allowed by law to an enlisted man of the United States Army. The following statutes now regulate enlistments in the Army of the United States:

> Recruits enlisting in the army must be effective and able-bodied men, between the ages of eighteen and thirty-five years, at the time of their enlistment. This limitation as to age shall not apply to soldiers reenlisting. (Sec. 1116, Revised Statutes.)
>
> The limits of age for original enlistments in the army shall be eighteen and thirty-five years. (Sec. 4, act of March 2, 1899, 30 Stat. L., 978.)
>
> In time of peace no person (except an Indian) who is not a citizen of the United States,

or who has not made legal declaration of his intention to become a citizen of the United States, or who is over thirty-five years of age, shall be enlisted for the first enlistment in the army. (Sec. 4, Ibid.)

No person under the age of twenty-one years shall be enlisted or mustered into the military service of the United States without the written consent of his parents or guardians: *Provided*, That such minor has such parents or guardians entitled to his custody and control. (Sec. 1117, Revised Statutes.)

No minor under the age of sixteen years, no insane or intoxicated person, no deserter from the military service of the United States, and no person who has been convicted of a felony shall be enlisted or mustered into the military service. (Sec. 1118, Revised Statutes.)

Every officer who knowingly enlists or musters into the military service any minor over the age of sixteen (eighteen) years without the written consent of his parents or guardians, or any minor under the age of sixteen years, or any insane or intoxicated persons, or any deserter from the military service of the United States, or any person who has been convicted of any infamous criminal offense shall, upon conviction, be dismissed from the service, or suffer such other punishment as a court-martial may direct. (Third article of war. Sec. 4, act of March 2, 1899, 30 Stat. L., 978.)

That hereafter all enlistments in the army shall be for the term of three years, and no soldier shall be again enlisted in the army

whose service during his last preceding term of enlistment has not been honest and faithful. (Sec. 2, act of August 1, 1894, 28 Stat. L., 216.)

The following regulations in furtherance of the statutes above cited provide that:

After the nature of the service and terms of enlistment have been fully explained to the applicant, and before the enlistment blanks are filled, the officer will read to him and offer for his signature the following declaration which will be contained in the enlistment paper:

I, ——— ———, desiring to enlist in the Army of the United States for the term of three years, do declare that I have neither wife nor child; that I am of the legal age to enlist, and believe myself to be physically qualified to perform the duties of an able-bodied soldier; and I do further declare that I am of good habits and character in all respects and have never been discharged from the United States service (army or navy) or any other service on account of disability or through sentence of either a civil or military court, nor discharged from any service, civil or military, except with good character, and for the reasons given by me to the recruiting officer prior to this enlistment. (Here add, in case of an applicant for first enlistment: And that I am, or have made legal declaration of my intention to become, a citizen of the United States.)

Given at ———, this —— day of ———, 19—. (Sec. 862, U. S. Army Regulations.)

Recruiting officers will not allow any man to be enticed into the service by false representations, but will, in person, explain to every man before he signs the enlistment paper the nature of the service, the length of term, the amount of pay, clothing, rations, and other allowances to which a soldier is entitled by law. (Sec. 863, Ibid.)

As soon as practicable, and within six days after he has been accepted on probation, the following form of enlistment will be signed by and oath administered to the recruit:

STATE OF ———, *County of* ———, *ss.*

I, ——— ———, born in ———, in the State of ———, aged —— years and — months, and by occupation a ———, do hereby acknowledge to have voluntarily enlisted (or reenlisted) this —— day of ——, 190—, as a soldier in the Army of the United States of America, for the period of three years, unless sooner discharged by proper authority; and do also agree to accept from the United States such bounty, pay, rations, and clothing as are or may be established by law. And I do solemnly swear (or affirm) that I will bear true faith and allegiance to the United States of America; that I will serve them honestly and faithfully against all their enemies whomsoever; and that I will obey the orders of the President of the United States, and the orders of the officers appointed over me, according to the Rules and Articles of War.

* * * * *

This oath may be administered by any commissioned officer of the Army. (Sec. 864, Ibid.)

The act of enlistment is concluded by the administration of the oath prescribed in the second article of war, which provides that—

> These rules and articles shall be read to every enlisted man at the time of or within six days after his enlistment, and he shall thereupon take an oath or affirmation in the following form: "I, A. B., do solemnly swear (or affirm) that I will bear true faith and allegiance to the United States of America; that I will serve them honestly and faithfully against all their enemies whomsoever; and that I will obey the orders of the President of the United States, and the orders of the officers appointed over me, according to the Rules and Articles of War." This oath may be taken before any commissioned officer of the army. (Second article of war, sec. 1342, R. S.)

It is well established that the recruit who enlists in the military service enters into a specific undertaking to serve as a soldier. The terms of the undertaking are set forth in the enlistment contract, but it was said by this court in the Grimley case:

> This case involves a matter of contractual relation between the parties; and the law of contracts, as applicable thereto, is worthy of notice. The Government, as contracting party, offers contract and service. Grimley accepts such contract declaring that he possesses all the qualifications prescribed in the Government's offer. The contract is duly signed. Grimley has made an untrue statement in regard to his qualifications. The Government

> makes no objection because of the untruth. The qualification is one for the benefit of the Government, one of the contracting parties. Who can take advantage of Grimley's lack of qualification? Obviously only the party for whose benefit it was inserted. (*U. S.* v. *Grimley*, 137 U. S., 147.)

The court also said:

> But in this transaction something more is involved than the making of a contract, whose breach exposes to an action for damages. Enlistment is a contract; but it is one of those contracts which changes the status; and, where that is changed, no breach of the contract destroys the new status or relieves from the obligations which its existence imposes. (Ibid., p. 151.)

Elsewhere the court says:

> By enlistment the citizen becomes a soldier. His relations to the State and the public are changed. He acquires a new status, with correlative rights and duties; and although he may violate his contract obligations, his status as a soldier is unchanged. He can not of his own volition throw off the garments he has once put on, nor can he, the State not objecting, renounce his relations and destroy his status on the plea that, if he had disclosed truthfully the facts, the other party, the State, would not have entered into the new relations with him, or permitted him to change his status. (Ibid., p. 152.)
>
> No more can an enlisted soldier avoid a charge of desertion, and escape the conse-

quences of such act, by proof that he was over age at the time of enlistment, or that he was not able-bodied, or that he had been convicted of a felony, or that before his enlistment he had been a deserter from the military service of the United States. These are matters which do not inhere in the substance of the contract, do not prevent a change of status, do not render the new relations assumed absolutely void. And in the case of a soldier, these considerations become of vast public importance. While our Regular Army is small compared with those of European nations, yet its vigor and efficiency are equally important. Any army is not a deliberative body. It is the executive arm. Its law is that of obedience. No question can be left open as to the right to command in the officer, or the duty of obedience in the soldier. Vigor and efficiency on the part of the officer and confidence among the soldiers in one another are impaired if any question be left open as to their attitude to each other. So, unless there be in the nature of things some inherent vice in the existence of the relation, or natural wrong in the manner in which it was established, public policy requires that it should not be disturbed. (Ibid., p. 153.)

It was said by Judge-Advocate-General Holt in 1865, with the approval of the Secretary of War, that—

> Due enlistment and the receipt of pay are placed upon the same footing by the forty-seventh article of war. *Held*, therefore that receipt of pay from the United States, as a soldier, estops the party from denying the status

which he has thus openly assumed, when sought to be made amenable as a deserter. A party who has voluntarily rendered service as an enlisted man and as such has been armed, clothed, and fed by the Government is estopped from denying the validity of his contract of enlistment upon the ground of informality therein, and is entitled to pay for the period of such service. (Par. 1252, Dig. Opins., J. A. G.)

The allegation in a specification to the charge of desertion, that the accused was "duly enlisted," held established by evidence of his identification as a member of his company, or of facts that show an acquiescence on his part in the status of a soldier, such as the receipt of pay, doing of military duty, etc. (Par. 1253, ibid.)

* * * on a charge of desertion or other offense against military discipline, it will be sufficient to prove that the accused received the pay, or did the duties of a soldier, without other proof of his enlistment or oath. (3 Greenleaf on Evidence, sec. 483; see also Lebanon *v.* Heath, 47 N. H., 359; *ex parte* Anderson, 16 Iowa, 599.)

B. The discharge of enlisted men.—The discharge of enlisted men, since May 31, 1786, has been regulated by the requirements of several statutes which, as embodied in the fourth article of war, provide that—

No enlisted man duly sworn shall be discharged from the service without a discharge in writing, signed by a field officer of the regiment to which he belongs, or by the commanding officer when no field officer is present; and

> no discharge shall be given to any enlisted man before his term of service has expired, except by order of the President, the Secretary of War, the commanding officer of a department, or by sentence of a general court-martial. (Fourth article of war, sec. 1342, R. S.)

The foregoing article appears as article 11 of the Code of 1806, which provides that—

> After a noncommissioned officer or soldier shall have been duly enlisted and sworn, he shall not be dismissed the service without a discharge in writing; and no discharge granted to him shall be sufficient which is not signed by a field officer of the regiment to which he belongs, or commanding officer where no field officer of the regiment is present; and no discharge shall be given to a noncommissioned officer or soldier before his term of service has expired but by order of the President, the Secretary of War, the commanding officer of a department, or the sentence of a general court-martial; nor shall a commissioned officer be discharged the service but by order of the President of the United States or by sentence of a general court-martial. (Act of April 11, 1806, 2 Stat. L., 259.)

Article 11 of the Code of 1806, cited *supra*, also contains the substantial requirements of No. 13 of the articles which were contained in the resolution of Congress of May 13, 1786, which provides that:

> No commissioned officer shall be cashiered, excepting by order of Congress, or by the sentence of a general court-martial; and no noncommissioned officer or soldier shall be

> discharged the service, but by the order of Congress, the Secretary of War, the commander in chief, or commanding officer of a department, or by the sentence of a general court-martial. (Art. 13, resolution of Congress, May 13, 1786.)

It will thus appear from a comparison of the acts of legislation above cited, that, in the revision of the Articles of War, which was made the subject of legislative action in 1806, the attempt was made to adapt the requirements of the articles of 1776 and 1786 to the conditions existing in the Government under the Constitution. The Government under the Articles of Confederation had consisted of a legislative department only, executive duties being performed in some cases by the Congress itself, in others by committees or boards charged with the performance of specific executive duties; and in still other matters, relating to the military establishment, by General Washington as Commander-in-Chief of the congressional forces.

In the revision of 1806 the new legal and constitutional conditions were borne in mind, and the verbiage of the several articles was so drawn as to bring them into harmony with the apportionment of sovereign powers among the three coordinate branches of the Government which were established by the Constitution and which went into operation on April 30, 1789.

The Articles of War adopted by the Continental Congress in its resolutions of 1776 and 1786 con-

tinued in force from the organization of the Government under the Constitution, in 1789, until the Articles of War were revised by Congress in 1806. This was accomplished in the operation of the act of September 29, 1789, which contained the requirement that:

> * * * The establishment contained in the resolve of the late Congress of the third day of October, one thousand seven hundred and eighty-seven, except as to the mode of appointing officers, and also as is hereinafter provided, be, and the same is hereby, recognized to be the establishment for the troops in the service of the United States. (Sec. 1, act of Sept. 27, 1789, 1 Stat. L., 95.)
>
> * * * That the said troops shall be governed by the rules and articles of war which have been established by the United States in Congress assembled, or by such rules and articles of war as may hereafter by law be established. (Sec. 4, Ibid.)
>
> * * * That this act shall continue and be in force until the end of the next session of Congress, and no longer. (Sec. 6, Ibid.)

But the enactment last above cited, prior to its expiration by its own limitation, was extended in its operation by the act of April 30, 1790 (1 Stat. L., 119), which was itself extended by the following enactments:

Sec. 3, act of March 3, 1791 (1 Stat. L., 222).

Sec. 11, act of March 5, 1792 (1 Stat. L., 241).

Sec. 4, act of May 2, 1792 (1 Stat. L., 264).

Sec. 7, act of May 2, 1792 (1 Stat. L., 272).

Sec. 4, act of May 9, 1794 (1 Stat. L., 366).

Sec. 14, act of March 3, 1795 (1 Stat. L., 430).

Sec. 20, act of May 30, 1796 (1 Stat. L., 463).

Sec. 2, act of April 27, 1798 (1 Stat. L., 552).

Sec. 3, act of May 28, 1798 (1 Stat. L., 558).

Sec. 8, act of July 16, 1798 (1 Stat. L., 604).

Sec. 8, act of March 2, 1799, Chap. 27 (1 Stat. L., 721).

Sec. 3, act of March 2, 1799, Chap. 31 (1 Stat. L., 725).

Sec. 10, act of March 16, 1802 (2 Stat. L., 132).

The articles of 1776 were prepared by a committee of the Continental Congress, of which John Adams and Thomas Jefferson were members. A tentative body of articles had been adopted by the Continental Congress in 1775, in which the British mutiny act and the Articles of War of 1774, then in force in the British army, were reenacted, with some changes and omissions, for the government of the colonial forces (resolution of Congress, June 30, 1775—1 Journal of Congress, 120); these were repealed, however, by the resolution of September 30, 1776 (2d Journal of Congress, 343). Articles governing the procedure of courts-martial and other matters were added by resolution of Congress of May 31, 1786. (Callan, Military Laws, 1789 to 1863, p. 78.)

The American articles of 1776, as added to and modified in some particulars by the Code of 1786, are generally conceded to have been derived from the British Code of 1774; this view is based upon a close similarity in the arrangement of paragraphs and a

corresponding similarity in the language used in the two codes—that employed in the American articles of 1776 corresponding more closely to the language used in the British Code of 1774 than to the verbiage of the British articles of 1765, which were in force among the colonial troops that were continued in the service after the close of the war with France.

The British articles of 1774 contained the following requirements in respect to the discharge of enlisted men:

> SECTION 3. After a noncommissioned officer or soldier shall have been duly enlisted and sworn he shall not be dismissed our service without a discharge in writing, and no discharge granted to him shall be allowed of as sufficient which is not signed by a field officer of the regiment into which he was enlisted, or commanding officer, where no field officer of the regiment is in Great Britain. (Sec. 3, art. II, British Articles of 1774.)
>
> SECTION 15. No commissioned officer shall be cashiered or dismissed from our service excepting by an order from us, or by the sentence of a general court-martial approved by us, or by some person having authority from us, under our sign manual; but noncommissioned officers may be discharged as private soldiers, and by the order of the colonel of the regiment or by the sentence of a regimental court-martial be reduced to private sentinels. (Sec. 15, art. 15, British Articles of 1774.)

The earliest set of British articles of which we have any authentic knowledge was that issued by Prince

Rupert, probably in 1672, under his commission as a general. These articles ceased to have obligatory force upon the termination of the command which he had exercised under his commission from the Crown, but have furnished the basis for subsequent codes in the British military service which, prior to the mutiny act, were issued by the sovereign in virtue of his prerogative as commander in chief. The corresponding article of the Prince Rupert code contains the requirement that:

> No commission officer after enrollment and being mustered, shall be dismiss'd or cashier'd, without order from us, or our general, or our general court-martial.
>
> But for noncommission-officers, or private souldiers, their captains, with the approbation of their colonels, or of the governour of the garrison where they are, may discharge them when they find cause, taking other noncommission-officer or souldier in their places. Provided that such colonel or governour shall forthwith certifie the commissaries general of the Musters, that (by their approbation) such noncommission-officers or souldiers were discharged, and others taken in their places respectively.
>
> And in quarters and garrisons, where there are only single troops or companies, the captains certificates are forthwith to be sent and accepted by the commissaries general, expressing the day of each noncommission-officer or souldiers discharge, or death, and who

> was entertained in his place. (Article 49, Prince Rupert Articles.)

See also No. 42 of the "Articles for the Better Government of Their Majesties' (William and Mary) Forces in the Low Countries and Parts Beyond the Sea." (Walton's History of the British Standing Army, Appendix 53, p. 814.)

2. *The separation of an enlisted man from the military service involves two distinct and separate acts, originating with two equally distinct and independent authorities:* (1) *The ordering of the discharge by the officer competent to order or direct that the discharge shall issue; this is an act involving an exercise of executive discretion.* (2) *The execution of the discharge certificate and the severance of the soldier's connection with the military service in the operation of that instrument; this is a ministerial duty, involving no exercise of discretion.*

The discretion above outlined was observed by Congress in the enactment of Article II of the Code of 1806. The first clause of that article points out the officer whose duty it is to sign the discharge certificate and execute the discharge, by the requirement that:

> ART. 11. After a noncommissioned officer or soldier shall have been duly enlisted and sworn, he shall not be dismissed the service without a discharge in writing; and no discharge granted to him shall be sufficient which is not signed by a field officer of the regiment to which he belongs, or commanding officer, where no field officer of the regiment is present. (Art. 11, Act of Apr. 10, 1806, 2 Stat. L., 259.)

The last clause of the same article describes the authority by whom the discharge may be ordered, the requirement in that regard being:

> No discharge shall be given to a noncommissioned officer or soldier before his term of service has expired, but by order of the President, the Secretary of War, the commanding officer of a department, or the sentence of a general court-martial; nor shall a commissioned officer be discharged the service but by order of the President of the United States, or by sentence of a general court-martial. (Ibid.)

This distinction was made in the American articles of 1776 and 1786, from which the articles of 1806 were derived. Article 2 of Section III of the Code of 1776 provides that:

> After a noncommissioned officer or soldier shall have been duly enlisted and sworn, he shall not be dismissed the service without a discharge in writing; and no discharge, granted to him, shall be allowed of as sufficient, which is not signed by a field officer of the regiment into which he was enlisted, or commanding officer, where no field officer of the regiment is in the same State. (Sec. 3, art. 2, Resl. of Congress, Sept. 20, 1776.)

Article 13 of the Code of 1786 provides that—

> No commissioned officer shall be cashiered or dismissed from the service, excepting by order of Congress or by the sentence of a general court-martial; and no noncommissioned officer or soldier shall be discharged the service but by the order of Congress, the Secretary

> of War, the commander in chief, or commanding officer of a department, or by the sentence of a general court-martial. (Art. 13 of the Code of 1786.)

In 1847 the Attorney-General was requested by the Secretary of War to give an expression of his views as to the authority of the department—

> "to enlist men for the Regular Army for five years, with the condition that they are to be discharged at the end of the war with Mexico if it shall terminate before the end of five years from the date of enlistment."

It was held by Mr. Attorney-General Clifford that—

> By the Constitution, the power to raise armies is vested exclusively in Congress; and the executive department, in carrying the will of Congress into effect, must conform its action to the authority conferred on it. The acts above mentioned, in my opinion, give no discretion to make the contract of enlistment for a shorter term than five years, or to annex a condition that the troops are to be discharged at the end of the war with Mexico. The executive department had discretionary authority to discharge before the term of service has expired, but has no power to vary the contract of enlistment. (IV Opins. Atty. Genl., 537.)

The corresponding articles of the British Code of 1774 contain substantially the same requirement. Section 3 of article 2 of that code provides that:

> After a noncommissioned officer or soldier shall have been duly enlisted and sworn, he

> shall not be dismissed our service, without a discharge in writing, and no discharge granted to him shall be allowed of as sufficient which is not signed by a field officer of the regiment into which he was enlisted, or commanding officer, where no field officer of the regiment is in Great Britain. (Art. 2 of sec. 3 of the British Code of 1774.)

Section 15, article 15, of the same code provides that:

> No commissioned officer shall be cashiered or dismissed from our service excepting by an order from us, or by the sentence of a general court-martial approved by us, or by some person having authority from us, under our sign manual; but noncommissioned officers may be discharged as private soldiers. And by the order of the colonel of the regiment, or by the sentence of a regimental court-martial, be reduced to private sentinels. (Sec. 15, art. 15, British Code, 1774.)

Samuel, a learned commentator on the mutiny act and articles of war, who wrote in 1816, says of the articles last above cited, in speaking of the authority to order the discharge of noncommissioned officers and soldiers:

> 2. As to noncommissioned officers and soldiers. The first division of the latter branch of the article, following the order of the foregoing branch, refers to a simple dismissal of noncommissioned officers from the ranks of the army, dissolving the obligation of military service, returning such noncommissioned offi-

> cers into their original class, the undistinguished number of citizens, and implying no manner of stigma, the term used in the article excluding the possibility of a conclusion to that effect. This part of the article briefly says that "noncommissioned officers may be discharged as private soldiers and by the order of the colonel of the regiment." "As private soldiers" means either like private soldiers, or under the denomination of private soldiers, or in the same manner as private soldiers, whom the colonels of regiments for good and sufficient cause apparent to them are authorized to discharge. (Samuel's History of the British Army, 628.)

The power to order the dismissal of an officer, or the discharge of an enlisted man, or to disband a particular organization has always been regarded in England as being vested in the Crown, as an incident of the authority of the Sovereign as commander-in-chief.

Clode says:

> Though the engagement is made for a term certain, the Crown is under no obligation to retain the soldier either in pay or in arms for that period, but may discharge him at any time. It is an essential principle that the Crown should not only have but exercise this power without question or controversy. The safety of the Realm may depend in some measure on the immediate discharge or dismissal of any man or regiment in arms, and—equally—that the cause of such dismissal should not at the time be disclosed by the responsible min-

isters of the Crown. (Par. 121, Clode, Military Forces of the Crown, Vol. II, pp. 40–41.)

The same writer:

> As to the form and method of discharges, the field or commanding officer formerly gave them; but in the articles of war for the year 1817, a provision was inserted, that they should be given according to the general order for the time being in force. The articles for 1829 then provided that no soldier should be discharged unless by court-martial sentence, or order of the commander in chief or of the Crown, and the articles of war at present in force further provide that no soldier shall be discharged unless his services, conduct, character, and cause of his discharge be ascertained before a regimental board. (II Clode, Military Forces of the Crown, p. 47.)

Elsewhere the same writer says:

> The soldier, on the contrary, has no power of dissolving his engagement. That has always been enforced in the same words, though not with the infliction of the same punishment. (II Clode, Mil. Forces of the Crown, 40–41.)

As an illustration of the power of the Crown, in the matter of disbandment, the following order of disbandment in the case of the Fifth Regiment of Dragoons is of interest:

> HORSE GUARDS, *April 8, 1799.*
>
> His Majesty has taken into his most serious consideration the representation which has been made by his excellency the lord lieutenant of Ireland of the conduct of the Fifth or Royal

Irish Regiment of Dragoons, and is of opinion that the insubordination and the departure from discipline and principles which have ever distinguished the British Army therein exhibited require, especially in these times of warfare and exertion, that they should be marked by a punishment that may be severely felt and be long remembered by those misguided persons who have been guilty of the atrocious acts of disobedience which have brought this indelible stigma upon the corps and may serve as an example to all others of the consequences of such seditious and outrageous proceedings, and of His Majesty's firm determination to maintain subordination and discipline in his army and to support the authority of his officers in the execution of their duty.

It is on these grounds his majesty's determination that the Fifth or Royal Irish Regiment of Dragoons shall be forthwith disbanded.

* * * * *

His majesty is graciously pleased further to express his persuasion that there are many valuable officers in the regiment who have used their best endeavors to restore the order and to preserve the credit of the corps, and though in this measure of indispensable severity it was impossible to make any exceptions, the majority being clearly implicated in the misconduct for which the whole are suffering, yet his majesty will hereafter make the most pointed discrimination, and those of any rank

> who are deserving of the royal favor may rely on his majesty's disposition to attend to their merits and to avail himself of their future services. In consideration of the expense to which the officers of the Fifth or Royal Irish Regiment of Dragoons have been unavoidably exposed, his majesty has been graciously pleased to direct that their full pay shall be continued to them till the 24th of December next, at which period they will be placed on half-pay.
>
> HARRY CALVERT, *Adjutant-General.*

(Grose, Military Antiquities of the British Army, Vol. II, p. 234.)

3. *The separation of Private Reid from the military service was accomplished in strict conformity to law and to the requirements of his enlistment contract.*

The 4th Article of War, cited *supra*, describes two distinct and independent duties, and designates, by proper terms of description, the persons who are charged with their performance. The first clause of the articles charge a particular person with the duty of preparing and executing the discharge certificate, the requirement being:

> ART. 4. No enlisted man, duly sworn, shall be discharged from the service without a discharge in writing, signed by a field officer of the regiment to which he belongs, or by the commanding officer, when no field officer is present; * * * (Sec. 1342, R. S., 4th Article of War.)

The clause above cited charges a particular person with the ministerial duty of preparing the certificate of discharge, and carrying it into execution, but vests no authority in either of the officers named and described to order or direct that a discharge shall issue.

The second clause provides that:

> * * * No discharge shall be given to an enlisted man before his term of service has expired, except by order of the President, the Secretary of War, the commanding officer of a department, or by sentence of a general court-martial. (Sec. 1342, R. S., 4th article of war.)

It will be seen that the clause, last above cited, points out and describes, by title of office, the persons who are vested with authority to order, or direct, that the discharge in a particular case shall issue. This duty, from its nature, and incidents, involves an exercise of executive discretion. When the discretion provided for has been fully exercised, and a judgment reached in the operation of the statute, it constitutes authority for the "field officer" or "post commander" to execute the discharge.

The contract of enlistment, cited *supra*, stipulates that the soldier is to serve for three years, *unless sooner discharged by proper authority.*

"The proper authority" is that named in the fourth article of war, "The President, the Secretary of War, the commanding officer of a department," or the "sentence of a general court-martial," which is carried into effect by the officer convening the court,

that is, by the commanding general of a territorial department. (72d article of war; 109th article of war.)

Upon a proper showing in respect to the nature and character of the conduct of the enlisted men of the Twenty-fifth United States Infantry at Brownsville, Tex., on August 13, 1906, the following order was issued by the President, under the authority conferred by the fourth article of war:

SPECIAL ORDERS, }
No. 266. }

WAR DEPARTMENT,
Washington, November 9, 1906.

1. By direction of the President, the following-named enlisted men who on August 13, 1906, were members of Companies B, C, and D, Twenty-fifth Infantry, certain members of which organizations participated in the riotous disturbance which occurred in Brownsville, Tex., on the night of August 13, 1906, will be discharged without honor from the army by their respective commanding officers and forever debarred from reenlisting in the Army or Navy of the United States, as well as from employment in any civil capacity under the Government.

* * * * *

Company C, Twenty-fifth Infantry—

* * * * *

Private Oscar W. Reid,

* * * * *

The discharge certificate in each case will show that the discharge without honor is in

consequence of paragraph 1, Special Orders, No. 266, War Department, November 9, 1906. These soldiers are entitled to travel pay.

* * * * *

By order of the Acting Secretary of War:

ARTHUR MURRAY,
Chief of Artillery,
Acting Chief of Staff.

4. *The discharge of an enlisted man without honor is not a punishment, the operation of the instrument being to deprive the soldier of none of the rights conferred by an honorable discharge issued to a soldier whose service has been "honest and faithful."*

The soldier, *first*, in his contract of enlistment, and *second*, in the oath of enlistment which is prescribed in the 2d article of war, agrees to—

> bear true faith and allegiance to the United States of America; that I will serve them *honestly and faithfully* against all their enemies whomsoever, * * *. (2d Art. of War.)

The character of service that is to be rendered by the soldier under his contract of enlistment, as "honest and faithful," is made the subject of further statutory regulation in the act of August 1, 1894, which provides:

> That hereafter all enlistments in the army shall be for the term of three years, and no soldier shall be again enlisted in the army whose service during his last preceding term of enlistment has not been honest and faithful. (Sec. 2, act of Aug. 1, 1894, 28 Stat. L., 278.)

It was said by Judge-Advocate-General Lieber in 1896, with the approval of the Secretary of War:

> The discharge without honor is not a punishment. When a soldier is discharged before or on expiration of service he is entitled to a certificate to that effect, but he is not entitled to a certificate of honorable discharge (which is now only given to soldiers whose service has been honest and faithful) if in fact his service has not been honest and faithful. In such case he has failed to earn an honorable discharge and is given a discharge which discloses that fact—a discharge without honor. This discharge carries with it forfeiture of retained pay, if any, as an incident, not of the discharge, but of the failure to render honest and faithful service. Not being a discharge "by way of punishment for an offense" (sec. 1290, Rev. Stats.), forfeiture of travel allowances is not an incident of it. But when a soldier is discharged without trial on account of fraudulent enlistment, or "for disability caused by his own misconduct" (i. e. "without honor"), travel allowances are forfeited; in the first case by reason of the right of the Government, on the discovery of the fraud, to rescind the contract of enlistment and thus avoid all unexecuted obligations under it, and in the second under the provisions of the army appropriation act approved March 16, 1896. But a soldier discharged without honor, except for fraudulent enlistment, does not forfeit clothing money due him at date of discharge. (Par. 1132, Dig. Opins., J. A. G.)

It was held by the same officer, with similar approval, in 1892, that—

> The classification of discharges has never been assumed by Congress, but has been left by it to the executive branch of the Government. At present there are three kinds of discharges expressly recognized, to wit: The honorable, the dishonorable, and the discharge without honor. The dishonorable discharge is given only in the case of discharge by sentence of court-martial. The discharge without honor is given in the cases first specified in Circular 15, Headquarters of the Army, 1893, but this circular did not create such discharge; it merely gave it a name. Before the issue of the circular and as far back as the rebellion (notwithstanding that it was from time to time theoretically asserted that the only kind of discharges known to the law were the honorable and the dishonorable, and that all discharges except by sentence of court-martial were honorable), a third kind of discharge was, out of necessity, resorted to. It is now recognized that there is a kind of discharge which is neither honorable nor technically dishonorable, but must be classified by itself—this is the "discharge without honor." There were many soldiers summarily discharged during the rebellion for causes tainting the character of their discharges. In numerous cases the orders were made to read dishonorably discharged, although a dishonorable discharge in the technical sense of that term can not be imposed except by sentence of a court-martial. A summary dis-

charge can not be a dishonorable discharge if the term is used in such technical sense, but it may be for a cause tainting the character of the discharge—a discharge manifestly not honorable. Such a summary discharge is now called a discharge without honor. Its name, however, is only important as a recognition of a discharge, not technically dishonorable, but not honorable in fact. It might not be going too far to say that when soldiers were summarily "dishonorably discharged" during the rebellion the order was so worded simply because the soldier had done something to disgrace the service, and could not be in fact honorably discharged. Thus where a volunteer soldier under arrest for desertion was "dishonorably discharged" by order on account primarily of the desertion, held that while his discharge was not technically dishonorable, it was what is now called a discharge without honor, and therefore not honorable. The term also covers the summary dismissal of an officer. (Par. 1130, Dig. Opins., J. A. G., 1901.)

and

On the question whether a discharge by order (summary) was of the class designated as not honorable, i. e., without honor, held that in the absence of express evidence that such discharge was given on account of an unfitness for the service for which the person discharged was culpably responsible, or by reason of fraud in the enlistment, or when the person at the time of his discharge was in a status of dishonor, i. e., in confinement under the sentence of a general court-martial or of

a civil court, the discharge should be deemed honorable. (Par. 1131, Ibid.)

5. *The power to discharge, which is vested in the President and certain other public officers named in the 4th Article of War, involves an exercise of executive discretion which is not reviewable by the courts.*

The validity of certain legislation of Congress in respect to calling forth the constitutional militia was passed upon by this court in the case of *Martin* v. *Mott*. The act of February 28, 1795, contained the requirement that—

> Whenever the United States shall be invaded or be in imminent danger of invasion from any foreign nation or Indian tribe, it shall be lawful for the President of the United States to call forth such number of the militia of the State or States most convenient to the place of danger or scene of action as he may judge necessary to repel such invasion and to issue his order for that purpose to such officer or officers of the militia as he shall think proper. (Act of February 28, 1795. 1 Stat. L., 424.)

Mr. Justice Story, in delivering the opinion of the court, said:

> The power thus confided by Congress to the President is doubtless of a very high and delicate nature. A free people are naturally jealous of the exercise of military power; and the power to call the militia into actual service is certainly felt to be one of no ordinary magnitude. But it is not a power which can be executed without a correspondent respon-

sibility. It is, in its terms, a limited power, confined to cases of actual invasion, or of imminent danger of invasion. If it be a limited power, the question arises, by whom is the exigency to be judged of and decided? Is the President the sole and exclusive judge whether the exigency has arisen, or is it to be considered as an open question, upon which every officer to whom the orders of the President are addressed, may decide for himself, and equally open to be contested by every militiaman who shall refuse to obey the orders of the President? We are all of the opinion that the authority to decide whether the exigency has arisen belongs exclusively to the President, and that his decision is conclusive upon all other persons. We think that this construction necessarily results from the nature of the power itself, and from the manifest object contemplated by the act of Congress. The power itself is to be exercised upon sudden emergencies, upon great occasions of state, and under circumstances which may be vital to the existence of the Union. A prompt and unhesitating obedience to orders is indispensable to the complete attainment of the object. The service is a military service, and the command of a military nature, and in such cases every delay and every obstacle to an efficient and immediate compliance, necessarily tend to jeopard the public interests. While subordinate officers and soldiers are pausing to consider whether they ought to obey, or are scrupulously weighing

the evidence of the facts upon which the commander in chief exercises the right to demand their services, the hostile enterprise may be accomplished without the means of resistance. If "the power of regulating the militia and commanding its services in times of insurrection and invasion are (as it has been emphatically said they are) natural incidents to the duties of superintending the common defense, and watching over the internal peace of the confederacy" (Federalist, No. 29), these powers must be so construed as to the modes of their exercise as not to defeat the great end in view. If a superior officer has a right to contest the orders of the President, upon his own doubts as to the exigency having arisen, it must be equally the right of every inferior officer and soldier; and any act done by any person in furtherance of such orders would subject him to responsibility in a civil suit, in which his defense must finally rest upon his ability to establish the facts by competent proofs. Such a course would be subversive of all discipline and expose the best-disposed officers to the chances of ruinous litigation. Besides, in many instances, the evidence upon which the President might decide that there is imminent danger of invasion might be of a nature not constituting strict technical proof, or the disclosure of the evidence might reveal important secrets of state, which the public interest, and even safety, might imperiously demand to be kept in concealment. *Martin* v. *Mott* (12 Wheaton, 1929.)

Elsewhere in the same opinion it was said:

> Whenever a statute gives a discretionary power to any person, to be exercised by him upon his own opinion of certain facts, it is a sound rule of construction that the statute constitutes him the sole and exclusive judge of the existence of those facts. And in the present case we are all of opinion that such is the true construction of the act of 1795. It is no answer that such a power may be abused, for there is no power which is not susceptible of abuse. The remedy for this, as well as for all other official misconduct, if it should occur, is to be found in the Constitution itself. In a free government the danger must be remote, since, in addition to the high qualities which the Executive must be presumed to possess, of public virtue and honest devotion to the public interests, the frequency of elections and the watchfulness of the representatives of the nation carry with them all the checks which can be useful to guard against usurpation or wanton tyranny. (Ibid., 31–32.)

In the Grimley case it was held by the Court of Claims, in giving effect to the decision of this court in a case involving the operation of the enlistment contracts, as a restraint upon liberty (*In re Grimley*, 137 U. S., 147), that:

> After the decision of the Supreme Court the claimant had no right or shadow of right to be discharged. He understood that, and appealed to the clemency of the Secretary of War. This clemency was exercised in his

> favor, but upon conditions which claimant accepted and agreed to comply with in accepting discharge from the service. Power to discharge a soldier is a discretion vested in the President, exercised by him through the Secretary of War; and it is essential to the due exercise of this discretion that he have power to exercise it upon conditions prescribed by himself, and this power the judiciary does not desire to question or curtail. (*John Grimley* v. *U. S.*, 32 Ct. Claims, 285–294.)

In the case of *United States ex rel. Edwards* v. *Root* it was said by the Court of Appeals of the District of Columbia, in a case arising out of the action of the Secretary of War in arranging the relative rank of officers appointed to the Regular Army from the volunteer forces, in the operation of section 28, act of February 2, 1901 (31 Stat. L., 755), that—

> The act of 1901, for the reorganization and increase of the army, has been construed, and that construction acted upon, by the head of the War Department in a manner that concerns a large class of officers; and, though there might be some such question made as would suggest doubt as to the strict correctness of the construction adopted, yet the court can not be asked to solve the doubt, and thus to control and reverse the action of the department, as against the construction that has been adopted and acted upon in the administration of the affairs of the department, and by which the rights of others may be affected.

The principle upon this subject is well settled. It is declared by the Supreme Court of the United States, in United States *v.* Moore, 95 U. S., 760, 763; 24 L. ed., 588, 589, that "the construction given by a statute by those charged with the duty of executing it is always entitled to the most respectful consideration, and ought not be overruled without cogent reasons. (*Edwards* v. *Darby*, 12 Wheat., 210; 6 L. ed., 604; *United States* v. *State Bank*, 6 Pet., 29; 8 L. ed., 308; *United States* v. *Macdaniel*, 7 Pet., 7; 8 L. ed., 589.) The officers concerned are usually able men and masters of the subject. Not infrequently they are the draftsmen of the laws they are afterwards called upon to interpret."

With respect to the interpretation given the act of 1901 by the Secretary of War, and those acting under his direction, as set forth in the answer of the appellees, this court is not at all inclined to dissent from it, or to say that such construction was improper. That construction certainly tended to produce simplicity, as well as justice among those officers entitled to rank in the same grade with the appellant. The fixing of a common date up to which the prior commissioned service should be computed would seem to be essential in order to maintain order and simplicity as well as justice, in ranking the officers under that provision of the act. *United States ex rel. Edwards* v. *Root*, (22 Appeal Cases, Dist. of Col., 419–430).

In *United States* v. *Moore*, it was said by this court:

> The construction given to a statute by those charged with the duty of executing it is always entitled to the most respectful consideration, and ought not to be overruled without cogent reasons. (*Edwards* v. *Darby*, 12 Wheat., 210; *United States* v. *The State Bank of North Carolina*, 6 Pet., 29; *United States* v. *Macdaniel*, 7 id., 1.) The officers concerned are usually able men and masters of the subject. Not infrequently they are the draftsmen of the laws they are afterwards called upon to interpret. *United States* v. *Moore* (95 U. S., 760–763).

In *Decatur* v. *Paulding*, a case involving the power of the courts to compel the Secretary of the Navy to place the name of the widow of a deceased officer upon the pension roll, it was said by this court:

> The duty required by the resolution was to be performed by him, as the head of one of the executive departments of the Government, in the ordinary discharge of his official duties. In general, such duties, whether imposed by act of Congress, or by resolution, are not mere ministerial duties. The head of an executive department of the Government, in the administration of the various and important concerns of his office, is continually required to exercise judgment and discretion. He must exercise his judgment in expounding the laws and resolutions of Congress, under which he is, from time to time, required to act. If he doubts, he has a right to call on the Attorney-

General to assist him with his counsel; and it would be difficult to imagine why a legal adviser was provided by law for the heads of departments, as well as for the President, unless their duties were regarded as executive, in which judgment and discretion was to be exercised.

If a suit should come before this court which involved the construction of any of these laws the court certainly would not be bound to adopt the construction given by the head of a department; and if they supposed his decision to be wrong they would, of course, so pronounce their judgment. But their judgment upon the construction of a law must be given in a case in which they have jurisdiction and in which it is their duty to interpret the act of Congress in order to ascertain the rights of the parties in the cause before them. The court could not entertain an appeal from the decision of one of the secretaries nor revise his judgment in any case where the law authorized him to exercise discretion or judgment. Nor can it by mandamus act directly upon the officer and guide and control his judgment or discretion in the matters committed to his care in the ordinary discharge of his official duties. *Decatur* v. *Paulding* (14 Peters, 497, 515).

Elsewhere in the same opinion Chief Justice Taney says:

The interference of the courts with the performance of the ordinary duties of the execu-

> tive departments of the Government would be productive of nothing but mischief, and we are quite satisfied that such a power was never intended to be given to them. Upon the very subject before us the interposition of the courts might throw the pension fund and the whole subject of pensions into the greatest confusion and disorder. It is understood, from the Secretary's return to the mandamus, that in allowing the half pay it has always been calculated by the pay proper; and that the rations or emoluments to which the officer was entitled have never been brought into the calculation. Suppose the court had deemed the act required by the resolution in question a fit subject for a mandamus and in expounding it had determined that the rations and emoluments of the officer were to be considered in calculating the half pay? We can readily imagine the confusion and disorder into which such a decision would throw the whole subject of pensions and half pay; which now forms so large a portion of the annual expenditure of the Government, and is distributed among such a multitude of individuals. (Ibid., p. 516.)

To the same effect are:

Litchfield v. *Register & Receiver* (9 Wallace, 575).

Gaines v. *Thompson* (7 Wallace, 347).

Commissioner of Patents v. *Whitely* (4 Wallace, 522).

U. S. v. *Seamen* (17 Howard, 225).

U. S. v. *Guthrie* (Id., 204).

U. S. v. *Com. of Land Office* (5 Wallace, 563).

U. S. v. *Schurz* (102 U. S., 378).

International Contracting Co. v. *Lamont* (155 U. S., 303).

Astrom v. *Hammond* (Fed. Cas. No. 596; 3 McLean, 107).

State v. *Harrison* (34 Minn., 526; 26 N. W. Rep., 729.)

Respectfully submitted.

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O